

**2016 No. 49**

**PUBLIC PROCUREMENT**

**The Utilities Contracts (Scotland) Regulations 2016**

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*Coming into force in accordance with regulation 1*

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AMENDMENTS TO SUBORDINATE LEGISLATION

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972<sup>(a)</sup> and all other powers enabling them to do so.

These Regulations make provision for a purpose mentioned in that section and it appears to the Scottish Ministers that it is expedient for the following EU instruments to be construed as references to those EU instruments or provisions of those EU Instruments (as appropriate) as amended from time where they are expressly mentioned as such in these Regulations—

- (a) Council Regulation (EEC) No 2913/92 establishing the Community Customs Code<sup>(b)</sup>;
- (b) Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures<sup>(c)</sup>;
- (c) Regulation (EC) No. 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary<sup>(d)</sup>;
- (d) Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>(e)</sup>;
- (e) Commission Decision 2009/767/EC setting out measures facilitating the use of procedures by electronic means through the points of single contact under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2009) 7806)<sup>(f)</sup>;

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(a) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the 1998 Act”), Schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) (“2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 (c.7) (“2008 Act”), section 3(3) and Schedule, Part 1. The functions conferred upon the Minister of the Crown under section 2(2), insofar as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. Paragraph 1A of Schedule 2 was inserted by the 2006 Act, section 28 and was amended by the 2008 Act, Schedule, Part 1.

(b) OJ L 302, 19.10.1992, p.1; last amended by Council Regulation (EU) No 517/2013 (OJ L 158, 10.6.2013, p.1).

(c) OJ L 13, 19.1.2000, p.12, amended by Regulation (EC) No 1137/2008 (OJ L 311, 21.11.2008, p.1).

(d) OJ L 340, 16.12.2002, p.1.

(e) OJ L 145, 30.4.2004, p.1.

(f) OJ L 274, 20.10.2009, p.36, last amended by Commission Decision 2013/662/EU (OJ L 306, 16.11.2013, p.21).

- (f) Commission Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081)(a);
- (g) Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC(b);
- (h) Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council(c);
- (i) Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audio-visual media services(d); and
- (j) Directive 2014/25/EU of the European Parliament and of the Council on procurement entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC(e),

and they are to be construed accordingly.

## PART 1

### GENERAL

#### CHAPTER 1

#### CITATION, COMMENCEMENT, EXTENT, DEFINITIONS AND SUBJECT-MATTER

##### **Citation, commencement and extent**

**1.—**(1) These Regulations may be cited as the Utilities Contracts (Scotland) Regulations 2016.

##### *Commencement*

(2) Subject to paragraphs (3) and (4), these Regulations come into force on 18th April 2016.

(3) Regulation 38(1) to (7) (rules applicable to communication) comes into force—

- (a) for the purposes of regulations 50 (dynamic purchasing systems), 51 (electronic auctions), 52 (electronic catalogues), 61 (communication of technical specifications), 69(1) (form and manner of sending notices for publication at EU level) and 71 (electronic availability of procurement documents) on 18th April 2016;
- (b) for the purposes of regulation 53(6) (centralised purchasing activities and central purchasing bodies) on 18th April 2017; and
- (c) for all other purposes on 18th October 2018.

(4) Regulation 53(6) (centralised purchasing activities and central purchasing bodies) comes into force on 18th April 2017.

##### *Extent*

(5) These Regulations extend to Scotland only.

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(a) OJ L 53, 26.2.2011, p.66.

(b) OJ L 88, 4.4.2011, p.5; last amended by Council Delegated Regulation (EU) No 574/2004 (OJ L 159, 28.5.2014, p.41).

(c) OJ L 316, 14.11.2012, p.1.

(d) OJ L 95, 15.4.2010, p.1.

(e) OJ L 94, 28.3.2014, p.243.

## Interpretation

### 2.—(1) In these Regulations—

“accelerated open procedure” means an open procedure in which the utility has exercised the power conferred by regulation 43(5) (open procedure) to fix a time limit for the receipt of tenders which is shorter than the minimum specified in regulation 43(3) (open procedure);

“ancillary purchasing activity” means activity consisting of the provision of support to a purchasing activity, in particular in any of the following forms—

- (a) technical infrastructure enabling a utility to award a contract or to conclude a framework agreement for works, supplies or services;
- (b) advice on the conduct or design of procurement;
- (c) preparation and management of procurement for and on behalf of the utility concerned;

“buyer profile” means a page on the internet set up by a utility containing one or more of the following: periodic indicative notices, information on on-going invitations to tender, prospective and concluded contracts, cancelled procedures and any useful general information such as a contact point, telephone number, facsimile number, postal address or e-mail address;

“body governed by public law” means a body that has legal personality, is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and which—

- (a) is financed for the most part by the State, regional or local authorities, or by any other body governed by public law;
- (b) is subject to management supervision by any such authority or body; or
- (c) has an administrative, managerial or supervisory board more than half the members of which were appointed by any body referred to in sub-paragraph (a);

“call for competition” means a call for competition made in a manner permitted by regulation 42(5) (choice of procedures) or, where relevant, one of the notices referred to in regulation 89(1) (publication of notices) or a contest notice;

“candidate” means an economic operator that has sought an invitation or has been invited to take part in—

- (a) a restricted procedure;
- (b) a negotiated procedure with prior call for competition;
- (c) a negotiated procedure without prior call for competition;
- (d) a competitive dialogue procedure; or
- (e) an innovation partnership;

“central purchasing body” means a utility or contracting authority which provides one or more centralised purchasing activities whether or not including an ancillary purchasing activity;

“centralised purchasing activity” means activity conducted on a permanent basis in one of the following forms—

- (a) the acquisition of supplies or services intended for a utility;
- (b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for a utility;

“commenced”, in relation to procurement, except where otherwise provided, means—

- (a) where a contract notice has been sent to the Official Journal in order to invite offers or requests to be selected to tender for or to negotiate, or be selected to participate in a dialogue in relation to a contract, in respect of a proposed contract, framework agreement or dynamic purchasing system;
- (b) where a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that has commenced is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 65(3)(a) or (b) (periodic indicative notices) are satisfied;

- (c) where the utility has dispatched any form of advertisement seeking offers or expressions of interest in the proposed contract, framework agreement or dynamic purchasing system;
- (d) in any case where there is no such advertising, where the utility has contacted any economic operator—
  - (i) in order to seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
  - (ii) in response to an unsolicited expression of interest or offer in respect of a proposed contract, framework agreement or dynamic purchasing system; or
- (e) where the utility has sent a notice to the Official Journal in order to hold a design contest;

“Commission” means the European Commission;

“common technical specification” means a technical specification in the field of information and communication technology laid down in accordance with Articles 13 and 14 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council(a) as amended from time to time;

“concession contract” means a “works concession” or “services concession” as defined in paragraph (1) of Article 5 of the Concession Contracts Directive and which includes the transfer of an operating risk as set out in that paragraph;

“Concession Contracts Directive” means Directive 2014/23/EU of the European Parliament and Council on the award of concession contracts(b);

“contest notice” means the notice referred to in regulation 92(1) (notices);

“contract”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), and except where otherwise provided, means any works, supplies or services contract for pecuniary interest concluded in writing between one or more economic operators and one or more utilities;

“contract notice”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the notice referred to in regulation 67 (contract notices) or, where relevant, 89(1)(a) (publication of notices);

“contracting authority” means the State, a regional or local authority, a body governed by public law or an association formed by one or more such authorities or bodies;

“CPV” means the Common Procurement Vocabulary as adopted by Regulation (EC) No. 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary(c) as amended from time to time and “CPV Code” shall be construed accordingly;

“Defence and Security Regulations” means the Defence and Security Public Contracts Regulations 2011(d);

“design contest”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means those procedures which enable a utility to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes;

“disabled”, in relation to a person, means a disabled person within the meaning of the Equality Act 2010(e) and, in relation to a worker, means a disabled person who is a worker;

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(a) OJ L 316, 14.11.2012, p.1.

(b) OJ L 94, 28.3.2014, p.1.

(c) OJ L 340, 16.12.2002, p.1.

(d) S.I. 2011/1848, amended by S.S.I. 2012/88, S.S.I. 2012/89, S.I. 2015/102 and S.S.I. 2015/446.

(e) 2010 c.15.

“dynamic purchasing system”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the system referred to in regulation 50 (dynamic purchasing systems);

“economic operator”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means a person or a utility, or a group of such persons or utilities or both, including any temporary associations of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market;

“electronic means” means electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, radio, optical or other electromagnetic means;

“ESPD” means the European Single Procurement Document referred to in regulation 60 of the Public Contracts (Scotland) Regulations;

“European standard” means a standard adopted by a European standardisation organisation and made available to the general public;

“European Technical Assessment” means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the relevant European Assessment Document as defined in point 12 of Article 2 of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC(a) as amended from time to time;

“EU Publications Office” means the Publications Office of the EU;

“financial year” except where the context otherwise requires, means the period of 12 months ending on the date in any year in respect of which the accounts of a utility are prepared;

“framework agreement”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means an agreement between one or more utilities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular, terms with regard to price and, where appropriate, the quantity envisaged;

“GPA” means the Agreement on Government Procurement between certain parties to the World Trade Organisation signed in Marrakesh on 15th April 1994 as amended(b);

“innovation” means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations including with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy(c) for smart, sustainable and inclusive growth;

“international standard” means a standard adopted by an international standardisation organisation and made available to the general public;

“invitation to confirm interest” means an invitation which a utility sends in order to comply with regulation 72(3) (invitations to candidates);

“label” means any document, certificate or attestation confirming that the works, products, services, processes or procedures in question meet certain requirements;

“label requirements” means the requirements to be met by the works, products, services, processes or procedures in question in order to obtain the label concerned;

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(a) OJ L 88, 4.4.2011, p.5, last amended by Commission Delegated Regulation (EU) No 574/2014 (OJ L 159, 28.5.2014, p.41).

(b) All the substantive provisions of the Agreement were substituted by the Protocol which was approved, on behalf of the EU, by Council Decision 2014/115/EU (OJ L 68, 7.3.2014, p.1), to which the text of the Protocol is attached (at OJ L 68, 7.3.2014, p.2). In accordance with Article 3 of the Protocol, the Protocol has entered into force in the EU.

(c) European Commission COM(2010) 2020 3.3.2010.

“life cycle” means all stages which are consecutive or interlinked, or both, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation;

“main contractor” means an economic operator to which a utility has awarded a contract or framework agreement;

“national standard” means a standard adopted by a national standardisation organisation and made available to the general public;

“Official Journal” means the Official Journal of the European Union;

“periodic indicative notice”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), means the notice referred to in regulation 65 (periodic indicative notices), or where relevant, 89(1)(b) (publication of notices);

“procurement” means the process leading to the award of a contract or framework agreement or establishment of a dynamic purchasing system for the acquisition of works, supplies or services from an economic operator;

“procurement document” means a document produced or referred to by the utility to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

“Public Contracts (Scotland) Regulations” means the Public Contracts (Scotland) Regulations 2015(a);

“selection criteria”, except in regulation 93 (rules on the organisation of design contests and the selection of participants and the jury), means selection criteria set out by the utility in accordance with regulations 76 (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations);

“service contract” means a contract which has as its object the provision of services other than those referred to in the definition of “works contract”;

“standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is an international standard, a European standard or a national standard;

“supply contract” means a contract which has as its object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products, whether or not the contract also includes, as an incidental matter, siting and installation operations;

“technical reference” means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs;

“technical specification” has the meaning given by regulation 58 (technical specifications);

“tenderer” means an economic operator that has submitted a tender;

“TFEU” means the Treaty on the Functioning of the European Union(b);

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(a) S.S.I. 2015/446.

(b) OJ C 326, 26.10.2012, p.47.

“Utilities Contracts Directive” means Directive 2014/25/EU of the European Parliament and of the Council on procurement entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC(a);

“utility”, subject to regulation 111(6) (transitional provision and saving where procurement commenced before 18th April 2016), has the meaning given to it by regulation 4 (utilities);

“VAT” means value added tax charged in accordance with the Value Added Tax Act 1994(b);

“a work” means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function;

“works” means activities within the meaning of Schedule 1 (activities constituting works) and activities related to these;

“working day” means a day other than a Saturday, Sunday or bank holiday in Scotland within the meaning of the Banking and Financial Dealings Act 1971(c);

“works contract” means a contract which has as its object one of the following—

- (a) the execution, or both the design and execution, of works related to one of the activities specified in Schedule 1;
- (b) the execution, or both the design and execution, of a work;
- (c) the realisation by whatever means of a work corresponding to the requirements specified by the utility exercising decisive influence on the type or design of the work; and

“written” or “in writing” means any expression which can be read by a person, reproduced and subsequently communicated, including information transmitted and stored by electronic means.

(2) Unless the context otherwise requires, any expression used both in these Regulations and in the Utilities Contracts Directive has the meaning that it bears in that Directive.

(3) The value in pounds sterling of any amount expressed in Euros in these Regulations, except in regulation 95 (retention of contract copies), or any of the provisions of the Utilities Contracts Directive mentioned in these Regulations shall be taken to be the value determined by the Commission in accordance with Article 17 of the Utilities Contracts Directive and published from time to time in the Official Journal.

(4) In these Regulations (except regulation 101(4) (enforcement of duties through the courts)), where these Regulations refer to a period of time—

- (a) where the period follows an action taken, the day on which the action takes place is not counted in the calculation of the period;
- (b) the period must include at least 2 working days; and
- (c) where the last day of the period is not a working day, the period is extended to include the next working day.

### **Subject-matter and application of these Regulations**

3.—(1) Parts 1 to 4 establish rules on the procedures for procurement for the award of a contract, or to the organisation of a design contest, by a utility which—

- (a) has a value estimated to be not less than the threshold mentioned in regulation 15 (thresholds); and
- (b) is not excluded from the scope of Parts 1 to 4 by any other provision in Chapters 2 and 3 of this Part.

(2) Parts 1 to 4 are subject to Article 346 of the TFEU.

(3) The scope of Parts 1 to 4 does not include non-economic services of general interest.

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(a) OJ L 94, 28.3.2014, p.243.

(b) 1994 c.23.

(c) 1971 c.80.

## Utilities

4.—(1) For the purpose of these Regulations, a utility is a person which—

- (a) is a contracting authority or public undertaking and which pursues one of the activities referred to in regulations 8 to 14;
- (b) is not a contracting authority or public undertaking but whose activities include an activity referred to in regulations 8 to 14 which operate on the basis of special or exclusive rights granted by a competent authority.

(2) In this regulation, “public undertaking” means a person over which one or more contracting authorities are able to exercise, directly or indirectly, a dominant influence by virtue of one or more of the following—

- (a) their ownership of that person;
- (b) their financial participation in that person;
- (c) the rights accorded to them by the rules which govern that person.

(3) For the purposes of paragraph (2), a contracting authority is considered to be able to exercise a dominant influence over a person in any one or more of the following cases where it, directly or indirectly—

- (a) possesses the majority of the undertaking’s subscribed capital;
- (b) controls the majority of the voting power attached to the issued share capital of that person;
- (c) can appoint—
  - (i) more than half of the individuals who are ultimately responsible for managing that person’s affairs;
  - (ii) more than half of its members; or
  - (iii) in the case of a group of individuals, more than half of those individuals.

(4) In this regulation, “special or exclusive rights” mean rights granted by a competent authority by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities specified in regulations 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

(5) For the purposes of paragraph (4), rights do not constitute “special or exclusive rights” if they are granted by means of a procedure in which—

- (a) there was adequate publicity; and
- (b) the granting of those rights was based on objective criteria.

(6) The procedures referred to in paragraph (5) include—

- (a) procurement with a prior call for competition in accordance with—
  - (i) these Regulations or the Utilities Contracts (Scotland) Regulations 2012(a);
  - (ii) the Public Contracts (Scotland) Regulations or the Public Contracts (Scotland) Regulations 2012(b);
  - (iii) the Concession Contracts Directive; or
  - (iv) the Defence and Security Regulations; and
- (b) procedures in accordance with other legal acts of the EU as mentioned in Annex II of the Utilities Contracts Directive, as amended from time to time.

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(a) S.S.I. 2012/89.

(b) S.S.I. 2012/88.

### **Mixed procurement covering the same activity**

**5.**—(1) Where a procurement has as its subject different types of procurement all covering the same activity any part of which is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 24 (mixed procurement covering the same activity and involving defence and security aspects) applies.

(2) Where a procurement has as its subject a mixed contract including works, supplies or services for the pursuit of a single activity covered by these Regulations, the application of these Regulations to the procurement is determined by that part of the contract that characterises the main subject of the contract in question.

(3) For the purposes of paragraph (2), in the case of a mixed contract—

(a) consisting partly of services of a kind referred to in Chapter 1 of Part 3 and partly of other services; or

(b) consisting partly of supplies and partly of services,

the main subject shall be determined by reference to which of the respective supplies or services has the highest estimated value.

(4) Where a procurement has as its subject a mixed contract intended to cover a single activity but which includes different parts which are objectively separable and the procurement of which, if separate, would include matters that would be subject to the application of these Regulations and matters that would not, a utility may choose to award—

(a) separate contracts for the separate parts; or

(b) a single contract.

(5) Where a utility decides to award separate contracts under paragraph (4)(a) the application or otherwise of these Regulations to the procurement of each separate part shall be determined by reference to the characteristics of such part.

(6) Where a utility decides to award a single contract under paragraph (4)(b) these Regulations shall apply to the procurement of the single contract irrespective of the estimated value of any parts that, if separated, would not have been subject to the application of these Regulations.

(7) Where a single contract referred to in paragraph (4)(b) combines elements of works, supplies or service contracts together with a concession contract, the procurement shall be subject to the application of these Regulations where the estimated value of the part of the contract that would constitute a contract covered by these Regulations, calculated in accordance with regulation 16 (methods for calculating the estimated value), is equal to or greater than the applicable threshold determined in accordance with regulation 15 (thresholds).

(8) Where a mixed contract includes different parts which are objectively not separable the application or otherwise of these Regulations to the procurement of that contract shall be determined by reference to the main subject-matter of that contract.

### **Procurement covering several activities**

**6.**—(1) Where a procurement has as its subject a contract intended to cover several activities and includes an activity which is covered by Article 346 of the TFEU or the Defence and Security Regulations, regulation 25 (procurement covering several activities and involving defence and security aspects) applies.

(2) Where a procurement has as its subject a contract intended to cover several activities, a utility may decide to undertake procurement for the award of—

(a) separate contracts for the separate activities; or

(b) a single contract.

(3) For the purposes of paragraph (2), the choice between awarding a single contract or a number of separate contracts must not be made with the objective of excluding any such contract from the scope of (where applicable)—

(a) these Regulations;

- (b) the Public Contracts (Scotland) Regulations; or
- (c) the Concession Contracts Directive.

(4) Where a utility decides to award separate contracts under paragraph (2)(a), the application or otherwise of these Regulations to the procurement of each separate activity is determined by reference to the characteristics of such activity.

(5) Where a utility decides to award a single contract under paragraph (2)(b) the application of these Regulations to the procurement of the contract is determined by the activity for which the contract is principally intended.

(6) Where it is objectively impossible to determine for which activity the contract is principally intended pursuant to paragraph (5), the application of these Regulations to the procurement of the contract is determined in accordance with the following—

- (a) if one of the activities for which the contract is intended is subject to these Regulations and another is subject to the Public Contracts (Scotland) Regulations, the procurement of the contract is subject to the Public Contracts (Scotland) Regulations;
- (b) if one of the activities for which the contract is intended is subject to these Regulations and another is subject to the Concession Contracts Directive, the procurement of the contract is subject to these Regulations;
- (c) if one of the activities for which the contract is intended is subject to these Regulations and the other is not subject to these Regulations, the Public Contracts (Scotland) Regulations nor the Concession Contracts Directive, the procurement of the contract is subject to these Regulations.

## CHAPTER 2 ACTIVITIES

### **Common Provisions**

**7.—**(1) For the purposes of regulations 8 (gas and heat), 9 (electricity) and 10 (water), “supply” includes—

- (a) generation;
- (b) production, with the exception of the production of gas in the form of extraction; and
- (c) wholesale and retail sale.

(2) For the purposes of regulation 14 (extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels) “supply” includes production of gas in the form of extraction.

### **Gas and heat**

**8.—**(1) In the case of gas and heat, these Regulations apply to the following activities—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat;
- (b) the supply of gas or heat to such networks.

(2) The supply, by a utility which is not a contracting authority, of gas or heat to fixed networks which provide a service to the public shall not be considered an activity within the meaning of paragraph (1) where—

- (a) the production of gas or heat by that utility is the unavoidable consequence of carrying out an activity other than one referred to in paragraph (1) or in regulations 9 to 11; and
- (b) the supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the utility’s turnover, calculated on the basis of the average for the preceding 3 years, including the current year.

## **Electricity**

**9.**—(1) In the case of electricity, these Regulations apply to the following activities—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity;
- (b) the supply of electricity to such networks.

(2) The supply, by a utility other than one which is a contracting authority, of electricity to fixed networks which provide a service to the public shall not be considered an activity within the meaning of paragraph (1) where—

- (a) the production of electricity by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) or regulations 8 (gas and heat), 10 (water) or 11 (transport services); and
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of energy, calculated on the basis of the average for the preceding 3 years, including the current year.

## **Water**

**10.**—(1) In the case of water, these Regulations apply to the following activities—

- (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- (b) the supply of drinking water to such networks.

(2) These Regulations also apply to procurement for the award of a contract or design contest by a utility which pursues an activity referred to in paragraph (1) and which is connected with any of the following—

- (a) hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or irrigation or drainage installations;
- (b) the disposal or treatment of sewage.

(3) The supply, by a utility other than one which is a contracting authority, of drinking water to fixed networks which provide a service to the public shall not be considered an activity within the meaning of paragraph (1) where—

- (a) the production of drinking water by that utility takes place because its consumption is necessary for carrying out an activity other than one referred to in paragraph (1) or (2) or regulation 8, 9 or 11; and
- (b) the supply to the public network depends only on that utility's own consumption and has not exceeded 30% of that utility's total production of drinking water, on the basis of the average for the preceding 3 years, including the current year.

## **Transport services**

**11.**—(1) These Regulations apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by—

- (a) railway;
- (b) automated systems;
- (c) tramway;
- (d) trolley bus;
- (e) bus; or
- (f) cable.

(2) For the purposes of paragraph (1), a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority, such as—

- (a) conditions on the routes to be served;
- (b) the capacity to be made available; or
- (c) the frequency of the service.

### **Ports and airports**

**12.** These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of the provision of any of the following—

- (a) airports;
- (b) maritime ports;
- (c) inland ports;
- (d) other terminal facilities to carriers by air, sea or inland waterway.

### **Postal services**

**13.—(1)** These Regulations apply to activities relating to the provision of any of the following—

- (a) postal services;
- (b) services other than postal services, on condition that such services are provided by an entity which also provides postal services which are not directly exposed to competition within the meaning of regulation 32(2) (activities directly exposed to competition).

(2) In this regulation—

“postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight, which includes—

- (a) correspondence;
- (b) books;
- (c) catalogues;
- (d) newspapers;
- (e) periodicals; and
- (f) postal packages containing merchandise with or without commercial value;

“postal services” means services consisting of the clearance, sorting, routing and delivery of postal items, including both services falling within as well as services falling outside the scope of the universal service set up in accordance with the Postal Services Act 2011(a); and

“services other than postal services” means services provided in the following areas—

- (a) mail service management services (services both preceding and subsequent to despatch, including mailroom management services);
- (b) services concerning items for post not included in the definition of “postal item” in this paragraph, such as direct mail bearing no address.

### **Extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels**

**14.** These Regulations apply to activities relating to the exploitation of a geographical area for the purpose of—

- (a) extracting oil or gas;
- (b) extracting coal or other solid fuels;

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(a) 2011 c.5.

- (c) exploring for coal or other solid fuels.

CHAPTER 3  
MATERIAL SCOPE  
SECTION 1  
*Thresholds*

**Thresholds**

**15.**—(1) These Regulations apply to a procurement where the estimated value of the contract to be awarded (not including VAT) is equal to or greater than—

- (a) in the case of a supply or service contract or design contest, the amount specified in Article 15(a) of the Utilities Contracts Directive;
- (b) in the case of a works contract, the amount specified in Article 15(b) of the Utilities Contracts Directive;
- (c) in the case of a contract for a service listed in Schedule 2 (social and other specified services), the amount specified in Article 15(c) of the Utilities Contracts Directive.

(2) Where proposed works, acquisition of supplies or provision of services may be procured in the form of separate lots these Regulations do not apply to the award of a contract for a lot where—

- (a) the estimated value of that lot is less than—
  - (i) 80,000 Euros, in the case of supplies or services; or
  - (ii) 1 million Euros, in the case of works; and
- (b) the estimated total aggregate value of all such lots to be awarded without application of these Regulations does not exceed 20% of the estimated aggregate value of all the lots calculated in accordance with regulation 16 (methods for calculating the estimated value).

(3) References in paragraph (1) to the Utilities Contracts Directive are references to that Directive as amended from time to time.

(4) In this regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system and design contest.

**Methods for calculating the estimated value**

**16.**—(1) A utility must calculate the estimated value of a contract by reference to the total amount payable under it (regardless of the form of such payment), not including VAT.

(2) The total amount payable includes the amount payable as a result of the exercise of any form of option and any renewal of the contract as explicitly set out in the procurement documents.

(3) Where a utility provides for prizes or payments to candidates or tenderers it must take them into account when calculating the estimated value.

(4) Where a utility is comprised of separate operational units the utility—

- (a) may calculate the estimated value by reference to each such unit or certain category thereof where that unit or certain category thereof is independently responsible for its procurement; and
- (b) must calculate the estimated value by reference to the total for all the operational units which are not so responsible.

(5) A utility must not choose a method to be used to calculate the estimated value of a contract with the intention of excluding the contract from the application of these Regulations.

(6) A utility must not sub-divide a contract with the effect of excluding the contract from the application of these Regulations unless such sub-division is justified by objective reasons.

(7) The estimated value must be the value estimated at the moment at which the procurement is commenced.

(8) In the case of a framework agreement or dynamic purchasing system the estimated value shall be the total estimated value of all of the contracts envisaged pursuant to and for the total term of the agreement or system.

(9) In the case of an innovation partnership the estimated value shall be the total estimated value of the research and development activities to take place during all stages of the partnership together with the estimated value of works, supplies or services to be developed and delivered by the partner.

(10) In the case of a works contract the estimated value shall include the total estimated value of any supplies and services that are necessary for executing the works and are to be provided by the utility to the contractor.

(11) In the case of a works or service contract to be awarded in the form of separate lots, the estimated value shall be the total estimated value of all such lots.

(12) In the case of a contract for supplies which may be awarded in the form of separate lots the estimated value shall be the total estimated value of all such lots and these Regulations apply to each lot accordingly where the aggregate value of the lots is equal to or greater than the relevant threshold referred to in regulation 15 (thresholds).

(13) In the case of supply or service contracts which are regular in nature or which are intended to be renewed in a given period, the estimated value shall be calculated by reference to—

- (a) the total actual value of contracts of the same type awarded during the period of 12 months or the financial year preceding the proposed award of a further contract but with adjustment of such value, where possible, to take account of the changes in quantity or value which the utility considers likely to occur during the period of 12 months following the award of the contract; or
- (b) the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year.

(14) In the case of a supply contract relating to the leasing, rental, hire or hire purchase of products the estimated value shall be—

- (a) in the case of a fixed term contract for a period of less than or equal to 12 months, the total estimated value of the contract;
- (b) in the case of a fixed term contract for a period of more than 12 months, the total value including the estimated residual value; and
- (c) in the case of a contract without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

(15) In the case of a service contract for a service of a kind mentioned herein, the estimated value shall be calculated by reference to—

- (a) for insurance services, the premium payable and any other form of remuneration;
- (b) for banking and other financial services, the fees, commissions payable, interest and any other form of remuneration; and
- (c) for design contracts, the fees, commissions payable and any other form of remuneration.

(16) In the case of a service contract which does not indicate a total price, the estimated value must be calculated by reference to—

- (a) in the case of a contract for a fixed term of less than or equal to 48 months, the total value of the contract for its full term; and
- (b) in the case of a contract for a term of more than 48 months or a contract without a fixed term, the monthly value multiplied by 48.

## SECTION 2

*Excluded contracts and design contests; special provisions for procurement involving defence and security aspects*

### SUB-SECTION 1

*Exclusions applicable to all utilities and special exclusions for the water and energy sectors*

#### **Exclusion: Contracts awarded for the purpose of resale or lease to third parties**

17.—(1) Subject to paragraph (3), these Regulations do not apply to procurement for the award of a contract for the purpose of resale or lease to third parties, provided that the utility enjoys no special or exclusive right to sell or lease the subject of such contracts and other entities are free to sell or lease the subject of such contracts under the same conditions as the utility.

(2) A utility must notify the Commission, if so requested, of all the categories of products or activities which the utility regards as excluded under paragraph (1).

(3) Paragraph (1) does not apply to procurement carried out by a central purchasing body in order to perform a centralised purchasing activity.

#### **Exclusion: Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country**

18.—(1) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest by a utility—

- (a) for purposes other than the pursuit of its activities as described in regulations 8 to 14; or
- (b) for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the EU.

(2) A utility must notify the Commission, if so requested, of any activities which the utility regards as excluded under paragraph (1).

#### **Exclusion: Contracts awarded and design contests organised pursuant to international rules**

19.—(1) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest which the utility is obliged to award or organise in accordance with a procurement which is established by—

- (a) an international agreement or any other legal instrument creating international law obligations, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or any part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by its signatories; or
- (b) an international organisation.

(2) These Regulations do not apply to procurement for the award of a contract or the organisation of a design contest which the utility undertakes or organises in accordance with procurement rules provided by an international organisation or international financing institution where the contracts or design contests concerned are fully financed by that organisation or institution or is co-financed for the most part by that organisation or institution.

(3) This regulation does not apply to procurement for the award of a contract or the organisation of a design contest involving defence or security aspects which are awarded or organised pursuant to international rules.

### Exclusion: Specific exclusions for service contracts

**20.**—(1) These Regulations do not apply to procurement for the award of a service contract, framework agreement or dynamic purchasing system—

- (a) for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or of any estate, right, servitude or other interest in or over such land, buildings or property;
- (b) to an audio-visual or radio media service provider, for broadcasting time or programme provision;
- (c) for arbitration or conciliation services;
- (d) for any of the following legal services—
  - (i) legal representation of a client by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive<sup>(a)</sup> in—
    - (aa) arbitration or conciliation proceedings held in a member State, a third country or before an international arbitration or conciliation instance; or
    - (bb) judicial proceedings before the courts, tribunals or public authorities of a member State or a third country or before international courts, tribunals or institutions;
  - (ii) legal advice given by a lawyer within the meaning of Article 1 of the Lawyers' Services Directive—
    - (aa) in preparation of any proceedings referred to in paragraph (i); or
    - (bb) where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings;
  - (iii) document certification or authentication services which must be provided by a notary public;
  - (iv) legal services provided by trustees or appointed guardians or other legal services the providers of which are designated by a court or tribunal in the member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;
  - (v) other legal services which, in the member State concerned, are connected, even occasionally, with the exercise of official authority;
- (e) for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>(b)</sup> as amended from time to time;
- (f) for operations conducted with the European Financial Stability Facility or the European Stability Mechanism;
- (g) for loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments;
- (h) which is an employment contract;
- (i) for civil defence, civil protection or danger prevention services that are provided by non-profit organisations or associations and which are specified under CPV Codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services; or

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(a) OJ L 78, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ L 158, 10.6.2013, p.368).

(b) OJ L 145, 30.4.2004, p.1.

- (j) for public passenger transport services by rail or metro.

(2) In this regulation—

- (a) “Audio-visual Media Services Directive” means Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audio-visual media services<sup>(a)</sup> as amended from time to time;
- (b) “Lawyers’ Services Directive” means Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services<sup>(b)</sup>;
- (c) “media service provider” has the meaning given by Article 1(1)(d) of the Audio-visual Media Services Directive; and
- (d) “programme” has the meaning given by Article 1(1)(b) of the Audio-visual Media Services Directive but also includes radio programmes and radio programme materials, and “programme material” is to be construed accordingly.

**Exclusion: Service contracts awarded on the basis of an exclusive right**

21. These Regulations do not apply to procurement for a service contract to be awarded to a contracting authority or to an association of contracting authorities on the basis of an exclusive right which such authority or association of authorities enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU.

**Exclusion: Contracts awarded by certain utilities for the purchase of water and for the supply of energy or of fuels for the production of energy**

22. These Regulations do not apply to procurement for the award of a contract—

- (a) for the purchase of water by a utility engaged in one or both of the activities relating to drinking water referred to in regulation 10(1) (water);
- (b) by a utility which is active in the energy sector by engaging in an activity referred to in regulation 8(1) (gas and heat), 9(1) (electricity) or 14 (extraction of oil and gas and exploration for, or extraction of, coal or other solid fuel) for the supply of—
  - (i) energy; or
  - (ii) fuels for the production of energy.

SUB-SECTION 2

*Procurement involving defence and security aspects*

**Defence and security**

23.—(1) These Regulations apply to procurement for the award of contracts and to design contests organised in the fields of defence and security, with the exception of procurement or design contests—

- (a) to which the Defence and Security Regulations apply; or
- (b) to which those Regulations do not apply pursuant to regulations 7 or 9 of those Regulations.

(2) These Regulations do not apply to procurement for the award of contracts or design contests, not otherwise exempt by virtue of paragraph (1), to the extent that—

- (a) the protection of the essential security interests of the United Kingdom or another member State cannot be guaranteed by less intrusive measures; or

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(a) OJ L 95, 15.4.2010, p.1.

(b) OJ L 78, 26.3.1977, p.17, last amended by Council Directive 2013/25/EU (OJ L 158, 10.6.2013, p.368).

- (b) the application of these Regulations would oblige the United Kingdom to supply information the disclosure of which it considers contrary to the essential interests of its security.

(3) These Regulations do not apply where—

- (a) the procurement and performance of the contract or design contest are classified as secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in any part of the United Kingdom; and
- (b) the United Kingdom has determined that the protection of the essential interests concerned cannot be guaranteed by less intrusive measures.

(4) In this regulation reference to “less intrusive measures” includes, but is not limited to, imposing requirements aimed at protecting the confidential nature of information which the utility makes available in a contract award procedure as provided for in these Regulations.

### **Mixed procurement covering the same activity and involving defence and security aspects**

**24.**—(1) This regulation applies where a procurement has as its subject different types of procurement all covering the same activity, any part of which is covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) Where different parts of a given contract are objectively separable, a utility may decide to undertake procurement for the award of—

- (a) separate contracts for the separate parts; or
- (b) a single contract.

(3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(4) Where a utility decides to undertake procurement for the award of separate contracts for separate parts the applicable law for the procurement of each separate part is to be determined by the characteristics of such part.

(5) Where a utility decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract and—

- (a) part of the contract is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or
- (b) part of the contract is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations will not apply to such procurement.

(6) A utility may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where—

- (a) different parts of such a contract are not objectively separable; or
- (b) such decision is justified by objective reasons.

(7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

(8) Paragraph (5)(a) applies to a mixed contract to which both paragraph (5)(a) and (5)(b) could otherwise apply.

### **Procurement covering several activities and involving defence or security aspects**

**25.**—(1) This regulation applies where a procurement has as its subject a contract covering more than one activity, where one or more of those activities are covered by Article 346 of the TFEU or the Defence and Security Regulations.

(2) A utility may decide to undertake procurement for the award of—

- (a) separate contracts for the separate activities; or

(b) a single contract.

(3) Any decision to undertake a procurement for the award of a single contract must not be made for the purpose of excluding the procurement from the application of these Regulations or the Defence and Security Regulations.

(4) Where a utility decides to undertake procurement for the award of separate contracts for separate activities the applicable law for the procurement of each separate activity will be determined by the characteristics of such activity.

(5) Where a utility decides, in accordance with paragraph (6), to undertake a procurement for the award of a single contract and—

(a) part of the contract is intended to cover an activity which is covered by Article 346 of the TFEU, the contract may be awarded without applying these Regulations; or

(b) part of the contract is intended to cover an activity which is covered by the Defence and Security Regulations, the procurement may be undertaken in accordance with those Regulations, in which event these Regulations do not apply to such procurement.

(6) A utility may only decide to undertake a procurement for the award of a single contract of a kind referred to in paragraph (5) where such decision is justified by objective reasons.

(7) Paragraph (5)(b) is without prejudice to the thresholds and exclusions provided for by the Defence and Security Regulations.

(8) Paragraph (5)(a) applies to a mixed contract to which both paragraph (5)(a) and (5)(b) could otherwise apply.

#### **Contracts and design contests involving defence and security aspects which are awarded or organised pursuant to international rules**

**26.**—(1) These Regulations do not apply to procurement for the award of a contract or to a design contest involving defence or security aspects which the utility is obliged to award or organise in accordance with a procurement which is established by—

(a) an international agreement or arrangement, concluded in conformity with the Treaties, between the United Kingdom and one or more third country or part thereof and covering works, supplies or services intended for the joint implementation or exploitation of a project by their signatories;

(b) an international agreement or arrangement relating to the stationing of troops and concerning the undertakings of the United Kingdom or a third country; or

(c) an international organisation.

(2) These Regulations do not apply to procurement for the award of a contract or to the organisation of a design contest involving defence or security aspects which the utility carries out in accordance with procurement rules provided by an international organisation or international financing institution where the contract or design contest concerned is fully financed by that organisation or institution or is co-financed for the most part by such organisation or institution.

#### SUB-SECTION 3

##### *Special relations (cooperation, affiliated undertakings and joint ventures)*

#### **Exclusion: contracts between contracting authorities**

**27.**—(1) These Regulations do not apply to procurement for the award of a contract—

(a) by a contracting authority to a controlled person;

(b) by a controlled person to a contracting authority which controls that person; or

(c) by a controlled person to another controlled person where both such persons are controlled by the same contracting authority.

- (2) For the purpose of this regulation, a person is a “controlled person” where—
- (a) the contracting authority exercises over that person control similar to that which it exercises over its own departments;
  - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the authority or by other persons controlled by that authority; and
  - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (3) For the purpose of paragraph (2)(a) an authority shall be deemed to exercise control over a person similar to the control that it exercises over its own departments where—
- (a) it exercises a decisive influence over the strategic objectives and significant decisions of the person; or
  - (b) such control is exercised by another person which is itself controlled in the same way by the contracting authority.
- (4) These Regulations do not apply to procurement for the award of a contract by a contracting authority to a person which is jointly controlled.
- (5) For the purpose of paragraph (4) a person is jointly controlled where—
- (a) the contracting authority, jointly with other contracting authorities, exercises over that person control similar to that which the authorities exercise over their own departments;
  - (b) the person carries out more than 80% of its activities in the performance of tasks entrusted to it by the contracting authorities or by other persons controlled by those authorities; and
  - (c) no other person has direct private capital participation in the person with the exception of non-controlling and non-blocking forms of private capital participation required by any enactment, in conformity with the Treaties, which do not exert a decisive influence on the person being awarded the contract.
- (6) For the purpose of paragraph (5)(a) contracting authorities shall be deemed to exercise control over a person similar to the control that they exercise over their own departments where—
- (a) the decision making bodies of the person are composed of representatives of all participating contracting authorities;
  - (b) those contracting authorities jointly exercise a decisive influence over the strategic objectives and significant decisions of the person; and
  - (c) the person does not pursue any interests which are contrary to those of the contracting authorities.
- (7) For the purpose of paragraph (6)(a) individual representatives may represent several or all of the contracting authorities.
- (8) These Regulations do not apply to procurement for the award of a contract exclusively between two or more contracting authorities where—
- (a) the contract is for the purpose of establishing or implementing co-operation between those contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;
  - (b) the implementation of that co-operation is governed solely by considerations relating to the public interest; and
  - (c) the contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.
- (9) The percentage of activities referred to in paragraphs (2)(b), (5)(b) and (8)(c), shall be determined by reference to—
- (a) the average turnover of the person or, as the case may be, contracting authority for the period of 3 years preceding the date of the proposed contract award; or

- (b) an appropriate alternative activity-based measure such as costs incurred by the relevant person or contracting authority with respect to works, supplies and services for such 3 year period.

(10) Where paragraph (11) applies, an alternative credible measurement of activity shall be used and for this purpose use of business projections shall be treated as a credible measure.

(11) This paragraph applies where the turnover or an appropriate activity-based measure is not available for the preceding 3 years or is no longer relevant because of—

- (a) the date on which the person or contracting authority was created or commenced activities; or
- (b) a reorganisation of its activities.

### **Exclusion: contracts awarded to an affiliated undertaking**

**28.**—(1) Provided that the conditions in paragraphs (2) to (4) are met, these Regulations do not apply to procurement for the award of a contract—

- (a) by a utility to an affiliated undertaking; or
- (b) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities described in regulations 8 to 14, to an affiliated undertaking of one of its members.

(2) The conditions are that:—

- (a) in respect of service contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all services provided by that undertaking, derives from the provision of services to the utility or one or more of the utility's affiliated undertakings;
- (b) in respect of supply contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all supplies provided by that undertaking, derives from the provision of supplies to the utility or one or more of the utility's affiliated undertakings;
- (c) in respect of works contracts, at least 80% of the average total turnover of the affiliated undertaking over the preceding 3 years, taking into account all works provided by that undertaking, derives from the provision of works to the utility or one or more of the utility's affiliated undertakings.

(3) Where the turnover referred to in paragraph (2) is not available for the preceding 3 years because of the date on which an affiliated undertaking was created or commenced activities an alternative credible measurement of turnover shall be used for paragraph (2) and for this purpose use of business projections shall be treated as a credible measure.

(4) Where more than one affiliated undertaking of a utility form an economic group and provide the same or similar works, supplies or services, the percentages referred to in paragraph (2) shall be calculated taking into account the total turnover deriving respectively from the provision of works, supplies or services by those affiliated undertakings.

(5) In this regulation, “affiliated undertaking” means—

- (a) any undertaking the annual accounts of which are consolidated with those of the utility in accordance with the requirements of Directive 2013/34/EU of the European Parliament and of the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC(a); or

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(a) OJ L 182, 29.6.2013, p.19.

- (b) in the case of an undertaking which is not subject to that Directive, any undertaking that—
  - (i) may be, directly or indirectly, subject to a dominant influence by the utility;
  - (ii) may exercise a dominant influence over the utility; or
  - (iii) in common with the utility, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation or the rules which govern it.

(6) For the purposes of paragraph (5)(b), a dominant influence has the same meaning as in regulation 4(3) (utilities).

(7) This regulation applies despite the provisions of regulation 27 (exclusions: contracts between contracting authorities).

#### **Exclusion: Contracts awarded to a joint venture or to a utility forming part of a joint venture**

**29.**—(1) Subject to paragraphs (2) and (3), these Regulations do not apply to procurement for the award of a contract—

- (a) by a joint venture, formed exclusively by a number of utilities for the purpose of carrying out activities within the meaning of regulations 8 to 14, to one of those utilities; or
- (b) by a utility to such a joint venture of which it forms part.

(2) The joint venture must have been set up in order to carry out the activity concerned over a period of at least 3 years and the instrument setting up the joint venture must stipulate that the utilities which form it will be part of the joint venture for at least the same period.

(3) This regulation applies despite the provisions of regulation 27 (exclusions: contracts between contracting authorities).

#### **Notification of information**

**30.** A utility must notify to the Commission, if it so requests, the following information—

- (a) the names of the undertakings or joint ventures referred to in regulation 28 (exclusions: contracts awarded to an affiliated undertaking) or 29 (contracts awarded to a joint venture or to a utility forming part of a joint venture);
- (b) the nature and value of the contracts referred to in those regulations;
- (c) proof, as considered necessary by the Commission, that the relationship between the undertaking or joint venture, to which the contracts are awarded, and the utility complies with the requirements of those regulations.

#### SUB-SECTION 4 *Specific situations*

#### **Research and development services**

**31.** These Regulations only apply to procurement for the award of service contracts for research and development services which are covered by CPV Codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that—

- (a) the benefits accrue exclusively to the utility for use in the conduct of its own affairs; and
- (b) the service provided is wholly remunerated by the utility.

SUB-SECTION 5

*Activities directly exposed to competition and related procedural provisions*

**Activities directly exposed to competition**

**32.**—(1) These Regulations do not apply to procurement for the award of a contract or a design contest intended to enable an activity mentioned in regulations 8 to 14 to be carried out where that activity is directly exposed to competition on markets to which access is not restricted.

(2) For the purposes of paragraph (1), the activity is directly exposed to competition on markets to which access is not restricted only if—

- (a) the activity is covered by the following Commission decisions—
  - (i) Commission Decision 2006/211/EC establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to electricity generation in England, Scotland and Wales (notified under document number C(2006) 690)(a);
  - (ii) Commission Decision 2007/141/EC establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales (notified under document number C(2007) 559)(b); and
  - (iii) Commission Decision 2010/192/EU exempting exploration for and exploitation of oil and gas in England, Scotland and Wales from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (notified under document C(2010) 1920)(c); or
- (b) the procedure specified in regulation 33 (procedure for establishing whether regulation 32(2)(b) is applicable) is followed and regulation 33(2) applies.

(3) The activity referred to in paragraph (1) may form a part of a larger sector or be exercised only in certain parts of the United Kingdom.

**Procedure for establishing whether regulation 32(2)(b) is applicable**

**33.**—(1) The procedure referred to in regulation 32(2)(b) (activities directly exposed to competition) is as follows—

- (a) the Scottish Ministers or a utility submit a request to the Commission, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned, demonstrating that the activity in question is directly exposed to competition on markets to which access is not restricted on the basis of criteria that are in conformity with the provisions on competition of the TFEU; and
- (b) the request must specify—
  - (i) all the relevant facts including any law, regulation, administrative provision or agreement concerning compliance with the condition that the activity is directly exposed to competition on markets to which access is not restricted;
  - (ii) that the activity concerned is subject to the EU legislation listed in Annex III to the Utilities Contracts Directive where it is and, if so, the request must also specify the relevant implementing legislation applied in the United Kingdom giving rise to a presumption that access to the market is not restricted;

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(a) OJ L 76, 15.3.2006, p.6.  
(b) OJ L 62, 1.3.2007, p.23.  
(c) OJ L 84, 31.3.2010, p.52.

- (c) if free access to a given market cannot be presumed on the basis of paragraph (b)(ii), it must be demonstrated in the request referred to in sub-paragraph (b) that access to the market in question is free as a matter of fact and law;
- (2) This paragraph applies if, subject to paragraph (8), the Commission—
- (a) has adopted an implementing act establishing that the activity is directly exposed to competition on markets to which access is not restricted within the time limits specified in Annex IV to the Utilities Contracts Directive; or
  - (b) has not adopted an implementing act establishing whether or not the activity is directly exposed to competition on markets to which access is not restricted within the time limits specified in Annex IV to the Utilities Contracts Directive.
- (3) The request referred to in paragraph (1)(a) and (b) may concern activities which are part of a larger sector or which are exercised in certain parts of the United Kingdom.
- (4) The criteria referred to in paragraph (1)(a) may include—
- (a) the characteristics of the products or services concerned;
  - (b) the existence of alternative products or services considered to be substitutable on the supply side or demand side;
  - (c) the prices; and
  - (d) the actual or potential presence of more than one supplier of the products or provider of the services in question;
- (5) The geographical reference market on the basis of which exposure to competition is assessed shall consist of the area in which the utility concerned is involved in the supply and demand of products or services in which the conditions of competition—
- (a) are sufficiently homogenous; and
  - (b) can be distinguished from neighbouring areas (including because conditions of competition are appreciably different in those areas).
- (6) The assessment in paragraph (5) shall take into account, among other factors—
- (a) the nature and characteristics of the products or services concerned;
  - (b) the existence of entry barriers;
  - (c) the existence of consumer preferences;
  - (d) appreciable differences of the utility's market shares between the area concerned and neighbouring areas; and
  - (e) substantial price differences.
- (7) After the submission of a request, the Scottish Ministers or the utility may, with the Commission's agreement, substantially modify its request, including as regards the activities or the geographical area concerned.
- (8) Where a request has been modified, a new period for the adoption of the implementing act shall be calculated in accordance with paragraph 1 of Annex IV to the Utilities Contracts Directive unless a shorter period is agreed on between the Commission and either the Scottish Ministers or the utility which has submitted the request.

## CHAPTER 4

### GENERAL PRINCIPLES

#### **Principles of procurement**

**34.**—(1) A utility must, in carrying out any procurement or design contest which is subject to the application of these Regulations—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

(2) A utility must not design a procurement or design contest with the intention of excluding it from the application of these Regulations or of artificially narrowing competition.

(3) Without prejudice to the generality thereof, competition shall be deemed to be artificially narrowed for the purpose of paragraph (2) where the design of the procurement or design contest is made with the intention of unduly favouring or disadvantaging any particular economic operator.

(4) A utility must include in each contract or framework agreement such conditions relating to the performance of the contract or framework as meet the requirements mentioned in paragraph (5) and are reasonably necessary to ensure that the economic operator complies with environmental, social and employment law, including any relevant collective agreements or international law measures referred to in Annex XIV of the Utilities Contracts Directive as amended from time to time.

(5) The requirements referred to in paragraph (4) are that the conditions are—

- (a) linked to the subject matter of the contract or framework within the meaning of regulation 84 (conditions for performance of contracts); and
- (b) indicated in the call for competition or in the procurement documents.

### **Economic operators**

**35.**—(1) A utility must not reject an economic operator solely on the ground that under the law of any part of the United Kingdom it would require to be a natural or legal person if such economic operator is entitled to provide the relevant service under the law of the member State in which that operator is established.

(2) Where paragraph (3) applies, a utility may require an economic operator to state, in its tender or request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract.

(3) This paragraph applies where an economic operator which is a legal person is seeking the award of—

- (a) a works contract;
- (b) a supply contract which includes services or siting and installation operations; or
- (c) a services contract.

(4) A utility must not require a group of economic operators, including temporary associations, to have a specific legal form in order to be able to submit a tender or a request to participate.

(5) A utility may specify in the procurement documents the method by which a group of economic operators is to meet the requirements for qualification and qualitative selection referred to in regulations 75 to 79.

(6) Any method specified as referred to in paragraph (5) must be justified by objective reasons and must be proportionate.

(7) Any conditions for the performance of a contract by a group of economic operators, which are different from those imposed upon individual participants, must be justified by objective reasons and must be proportionate.

(8) A utility may, if it is necessary for the satisfactory performance of the contract, require a group of economic operators to assume a specific legal form for the purpose of the award of the contract.

(9) In this regulation reference to a “contract” includes reference to a framework agreement, dynamic purchasing system and design contest.

### **Reserved contracts**

**36.**—(1) A utility may—

- (a) reserve the right to participate in procurement for the award of a contract or framework agreement to a supported business; or

(b) provide for such a contract or framework agreement to be performed in the context of a supported employment programme.

(2) Where a utility is following the approach set out in paragraph (1), it must specify that fact in the call for competition and refer to Article 38 of the Utilities Contracts Directive.

(3) In this regulation—

“supported business” means an economic operator whose main aim is the social and professional integration of disabled or disadvantaged persons and where at least 30% of the employees of the economic operator are disabled or disadvantaged persons; and

“supported employment programme” means an employment programme operated by an economic operator the main aim of which is the social and professional integration of disabled or disadvantaged persons and where at least 30% of those engaged in the programme are disabled or disadvantaged persons.

## **Confidentiality**

**37.**—(1) A utility must not disclose information forwarded to it by an economic operator which the economic operator has designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

(2) Paragraph (1) is without prejudice to—

(a) any other provision of these Regulations, including the obligation relating to advertising of awarded contracts and to provision of information to candidates and tenderers set out in regulations 68 (contract award notices) and 73 (informing applicants for qualification, candidates and tenderers);

(b) the Freedom of Information (Scotland) Act 2002(a);

(c) the Environmental Information (Scotland) Regulations 2004(b); and

(d) any other enactment to which the entity is subject relating to the disclosure of information.

(3) A utility may impose upon an economic operator requirements aimed at protecting the confidential nature of information which the utility makes available throughout the procurement.

## **Rules applicable to communication**

**38.**—(1) Subject to paragraphs (3), (5) and (8), a utility must ensure that all communication and information exchange, including submission, pursuant to these Regulations is performed using electronic means of communication in accordance with this regulation.

(2) Subject to paragraph (13), the tools and devices to be used for electronic means of communication, and their technical characteristics, must—

(a) be non-discriminatory;

(b) be generally available;

(c) be interoperable with the information and communication technology products in general use; and

(d) not restrict economic operators’ access to the procurement.

(3) A utility is not obliged to require electronic means of communication in the submission process where—

(a) due to the specialised nature of the procurement, the use of electronic means of communication would require specific tools, devices or file formats that are not generally available or supported by generally available applications;

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(a) 2002 asp 13.

(b) S.S.I. 2004/520, amended by the Environmental Information (Scotland) Amendment Regulations 2013, S.S.I. 2013/127.

- (b) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or generally available applications or are under a proprietary licencing scheme and cannot be made available by the utility for downloading or remote use;
  - (c) the use of electronic means of communication would require specialised office equipment that is not generally available to a utility; or
  - (d) the procurement documents require the submission of physical or scale models which cannot be transmitted using electronic means.
- (4) Where, in accordance with paragraph (3), electronic means of communication is not required, communication must be carried out—
- (a) by post or by other suitable carrier; or
  - (b) by a combination of post or other suitable carrier and, to the extent that electronic means of communication is possible, by such means.
- (5) A utility is not obliged to require electronic means of communication in the submission process to the extent that the use of means of communication other than electronic means is necessary—
- (a) because of a breach of security of the electronic means of communication; or
  - (b) for the protection of information of a particularly sensitive nature which requires such a high level of protection that it cannot properly be ensured by using electronic tools and devices that are either generally available to economic operators or that can be made available to them by suitable alternative means of access in accordance with paragraph (14).
- (6) Where, in accordance with paragraph (3), a utility requires means of communication in the submission process other than electronic means, the utility must state the reason for this in the documentation referred to in regulation 96 (reporting and documentation requirements).
- (7) Where electronic means of communication is not required for a reason referred to in paragraph (5), the utility must state in the documentation referred to in regulation 96 (reporting and documentation requirements) the reasons why use of means of communication other than electronic means has been considered necessary under that paragraph.
- (8) Notwithstanding paragraph (1), oral communication may be used in respect of communications other than those concerning the essential elements of a procurement, provided that the content of the oral communication is documented by the utility.
- (9) For the purposes of paragraph (8) reference to “the essential elements of a procurement” includes the procurement documents, requests for participation, confirmations of interest and tenders.
- (10) A utility must, to a sufficient extent and by appropriate means, document oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders, in particular, by preparing written or audio records or summaries of the main elements of the communication.
- (11) In all communication, exchange and storage of information, a utility must ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved.
- (12) A utility must examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.
- (13) A utility may, where necessary, require the use of tools and devices which are not generally available, provided that the utility offers suitable alternative means of access.
- (14) A utility shall be deemed to offer suitable alternative means of access where the utility—
- (a) offers unrestricted and full direct access free of charge by electronic means to those tools and devices from the date of publication of the call for competition or from the date when the invitation to confirm interest is sent;
  - (b) ensures that tenderers having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits (provided that the lack of

access is not attributable to the tenderer) may access the procurement through the use of provisional tokens made available free of charge online; or

(c) supports an alternative channel for electronic submission of tenders.

(15) For the purpose of paragraph (14)(a) “date of publication of the call for competition” means the date of publication in the Official Journal after being sent in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

(16) A utility must specify in the call for competition or the invitation to confirm interest, referred to in paragraph (14)(a), the internet address at which those tools and devices are accessible.

(17) Tools and devices for the electronic receipt of tenders, requests to participate, applications for qualification and, in design contests, plans and projects, must—

- (a) enable the precise determination of the exact time and date of the receipt of tenders, requests to participate, applications for qualification and the submission of plans and projects;
- (b) to the extent reasonably possible, ensure that, before the time limit referred to in paragraph (12) has expired, no-one can have access to data transmitted to the utility using the tools and devices;
- (c) ensure that only authorised persons may set or change the dates for opening data received;
- (d) ensure that, during the various stages of the qualification procedure, the procurement or the design contest, only authorised persons may have access to data submitted or to part of such data;
- (e) ensure that only authorised persons may give access to data transmitted and only after the time limit referred to in paragraph (12) has expired;
- (f) ensure that data received and opened in accordance with the requirements in sub-paragraphs (a) to (e) remains accessible only to persons authorised to acquaint themselves with the data; and
- (g) to the extent reasonably possible, ensure that any infringement, or attempted infringement, of the conditions referred to in sub-paragraphs (b) to (f) is clearly detectable.

(18) In addition to the requirements set out in paragraph (17), a utility must comply with all of the following requirements in relation to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate—

- (a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, must be available to interested parties;
- (b) a utility must specify the level of security required for the electronic means of communication in the various stages of the specific procurement;
- (c) the level of security specified in accordance with sub-paragraph (b) must be proportionate to the risks attached;
- (d) where paragraph (19) applies, the utility must accept advanced electronic signatures supported by a qualified certificate, created with or without a secure signature creation device, subject to compliance with all of the following conditions—
  - (i) the utility must establish the required advanced electronic signature format on the basis of formats established in the Electronic Signature Commission Decision and must put in place necessary measures to be able to process these formats technically;
  - (ii) where a different format of electronic signature is used, the electronic signature or the electronic document carrier must include information on existing validation possibilities;
  - (iii) the validation possibilities must allow the utility to validate the received electronic signature as an advanced electronic signature supported by a qualified certificate,

such validation to be online, free of charge and in a way that is understandable for non-English speakers;

- (iv) where a tender is signed with an advanced electronic signature with the support of a qualified certificate from a provider that is included on a trusted list provided for in the Trusted Lists Commission Decision as amended from time to time, the utility must not apply additional requirements that may hinder the use of the signature by the tenderer.

(19) This paragraph applies where a utility concludes that the level of risk assessed in accordance with paragraphs (21) and (22) is such that advanced electronic signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures<sup>(a)</sup> as amended from time to time, are required.

(20) A utility shall assess the certificate referred to in paragraph (18)(d) by taking into account whether the certificate is provided by a certificate services provider which is on a trusted list provided for in the Trusted Lists Commission Decision as amended from time to time.

(21) In deciding the level of security required at each stage of a procurement, and in concluding whether the level of risk is such that advanced electronic signatures are required, a utility must assess the risks having regard to—

- (a) the likelihood of particular risks materialising;
- (b) the potential adverse consequences if those risks materialise;
- (c) the need for consistency as between similar procurements performed by the same utility; and
- (d) the need for proportionality between the expected benefits of any particular security requirements (in terms of eliminating or reducing any of the risks referred to in paragraph (22)) and the costs, burdens and obligations which those requirements may impose upon an economic operator.

(22) A utility must assess all relevant risks, including, in particular, where applicable—

- (a) the risk to the proper functioning and integrity of the specific procurement process, including risks of breaching these Regulations;
- (b) risks to national security;
- (c) the risk of inadvertent or unauthorised disclosure of, or access to, any economic operator's confidential information;
- (d) the risk of inadvertent or unauthorised disclosure of, or access to, information held by the utility including information relating to the specific procurement;
- (e) the risk that use of electronic communications could provide opportunity for malicious attacks on the electronic systems of, or data held by, the utility, any economic operator or any other person, including introduction of malware or denial of service attacks; and
- (f) any other material risk relating to the procurement in question.

(23) Paragraph (24) applies where—

- (a) a competent authority of the United Kingdom located in Scotland; or
- (b) another issuing entity located in Scotland,

signs and issues a document for use in a procurement within the scope of the Utilities Contracts Directive, whether the procedure is under these Regulations or under the law of any member State.

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<sup>(a)</sup> OJ L 13, 19.1.2000, p.12.

(24) The competent authority or issuing entity may establish the required advanced signature format in accordance with the requirements set out in Article 1(2) of the Electronic Signature Commission Decision, as amended from time to time, and where it does so—

- (a) it must put in place the necessary measures to be able to process that format technically by including the information required for the purpose of processing the signature in the document concerned; and
- (b) the documents must contain, in the electronic signature or in the electronic document carrier, information on existing validation possibilities that allow the validation of the received electronic signature online, free of charge and in a way that is understandable for non-English speakers.

(25) In this regulation—

“Electronic Signature Commission Decision” means Commission Decision 2011/130/EU establishing minimum requirements for the cross-border processing of documents signed electronically by competent authorities under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2011) 1081)(a); and

“Trusted Lists Commission Decision” means Commission Decision 2009/767/EC setting out measures facilitating the use of procedures by electronic means through the points of single contact under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (notified under document C(2009) 7806)(b).

## **Nomenclatures**

**39.** Any references to nomenclatures in the context of procurement must be made using the CPV.

## **Conflicts of interest**

**40.—(1)** A utility must take appropriate measures to prevent, identify and remedy conflicts of interest arising in the conduct of a procurement so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

(2) Without prejudice to the generality thereof, reference to “conflicts of interest” in paragraph (1) includes any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement.

(3) In paragraph (2)—

“relevant staff member” means staff members of the utility or of a procurement service provider acting on behalf of the utility, who are involved in the conduct of the procurement or may influence the outcome of that procedure; and

“procurement service provider” means a public or private body which offers an ancillary purchasing activity on the market.

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(a) OJ L 53, 26.2.2011, p.66.

(b) OJ L 274, 20.10.2009, p.36, last amended by Commission Decision 2013/662/EU (OJ L 306, 16.11.2013, p.21).

**PART 2**  
**RULES APPLICABLE TO CONTRACTS**  
**CHAPTER 1**  
**PROCEDURES**

**Conditions relating to the GPA and other international agreements**

**41.** In so far as they are covered by Annexes 3 to 7 to the EU's Appendix I to the GPA and by the other international agreements by which the EU is bound, a utility must accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.

**Choice of procedures**

**42.—**(1) When undertaking a procurement a utility must apply procedures that conform to these Regulations.

(2) A utility must apply one of the following procedures—

- (a) an open procedure;
- (b) a restricted procedure;
- (c) a negotiated procedure with a prior call for competition;
- (d) a competitive dialogue;
- (e) an innovation partnership;
- (f) a negotiated procedure without a prior call for competition.

(3) The procedures referred to in paragraph (2)(a) to (e) must include publication of a call for competition.

(4) The procedure referred to in paragraph (2)(f) does not require publication of a call for competition but it must only be used in one of the cases set out in regulation 48 (use of the negotiated procedure without prior call for competition).

(5) A call for competition may be made by means of—

- (a) a periodic indicative notice in accordance with regulation 65 (periodic indicative notices) but only where the contract is to be awarded following a restricted or negotiated procedure or competitive dialogue;
- (b) a notice on the existence of a qualification system in accordance with regulation 66 (notices on the existence of a qualification system) but only where the contract is to be awarded following a restricted or negotiated procedure, competitive dialogue or innovation partnership; or
- (c) a contract notice in accordance with regulation 67 (contract notices).

(6) When a call for competition is made by the means referred to in paragraph (5)(a), an economic operator which has expressed an interest following the publication of the periodic indicative notice, must subsequently be invited by the utility to confirm its interest in writing by means of an invitation to confirm interest in accordance regulation 72 (invitations to candidates).

(7) Nothing in these Regulations prevents a utility which has commenced a procurement from terminating that procurement at any time.

**Open Procedure**

**43.—**(1) In an open procedure, a utility must permit any interested economic operator to submit a tender in response to a call for competition within the time period set by the utility in accordance with this regulation.

(2) The tender must be accompanied by the information for qualitative selection that is required by the utility.

(3) Subject to paragraphs (4) to (6), the minimum time period for the receipt of tenders shall be 35 days from the date on which the contract notice is sent for publication.

(4) Where a utility has published a periodic indicative notice which was not itself used as a mean of calling for competition under regulation 42(5)(a) (choice of procedures), the minimum time limit for the receipt of tenders may be reduced to 15 days, provided that—

- (a) the periodic indicative notice included all the information required for the contract notice in Section I and II of Part A of Annex VI to the Utilities Contracts Directive, insofar as the information in section II was available at the time the periodic indicative notice was published; and
- (b) the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent for publication.

(5) Where a state of urgency duly substantiated by a utility renders it impracticable to apply the minimum time limit set out in paragraph (3), the utility may fix a time limit which must not be less than 15 days from the date on which the contract notice was sent for publication.

(6) A utility may reduce the minimum time period referred to in paragraph (3) by a period of up to 5 days where it accepts that tenders may be submitted by electronic means in accordance with regulation 38 (rules applicable to communication).

### **Restricted Procedure**

**44.**—(1) In a restricted procedure, a utility must permit any economic operator to submit a request to participate in response to a call for competition within the time period set by the utility in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the utility.

(3) The minimum time period for receipt of requests to participate, other than in exceptional circumstances, shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent,

and shall, in any event, not be less than 15 days from such date.

(4) Only those economic operators invited to do so by the utility following its assessment of the information provided may submit a tender.

(5) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(6) The minimum time limit for the receipt of tenders may be set by agreement between the utility and the economic operators invited to tender, provided that all such economic operators have the same time to prepare and submit their tenders.

(7) If there is no agreement made further to paragraph (6), the minimum time period for the receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.

### **Negotiated procedure with prior call for competition**

**45.**—(1) In a negotiated procedure with a prior call for competition, a utility must permit any economic operator to submit a request to participate in response to a call for competition within the time period set by the utility in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the utility.

(3) The minimum time period for receipt of requests to participate, other than in exceptional circumstances, shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent,

and shall, in any event, not be less than 15 days from such date.

(4) Only those economic operators invited to do so by the utility following its assessment of the information provided may participate in the negotiations.

(5) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(6) The minimum time limit for the receipt of tenders may be set by agreement between the utility and the economic operators invited to tender, provided that all such economic operators have the same time to prepare and submit their tenders.

(7) If there is no agreement made further to paragraph (6), the minimum time period for the receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.

### **Competitive Dialogue**

**46.**—(1) In a competitive dialogue, a utility must permit any economic operator to submit a request to participate in response to a call for competition in accordance with regulation 42(5)(b) or (c) (choice of procedures) within the time period set by the utility in accordance with this regulation.

(2) A request by an economic operator referred to in paragraph (1) must be accompanied by the information for qualitative selection that is requested by the utility.

(3) The minimum time period for receipt of a request to participate, other than in exceptional circumstances, shall be 30 days from the date on which—

- (a) the contract notice was sent for publication; or
- (b) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest was sent,

and shall, in any event, not be less than 15 days from such date.

(4) Only those economic operators invited to do so by the utility following its assessment of the information provided may participate in the dialogue.

(5) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(6) The contract must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 80 (contract award criteria).

(7) A utility must in the call for competition, in a descriptive document or in both—

- (a) set out and define its needs and requirements;
- (b) set out and define the chosen award criteria; and
- (c) set out an indicative timeframe.

- (8) A utility—
- (a) must open, with the participants selected in accordance with the relevant provisions of regulations 74 to 79, a dialogue with the aim of identifying and defining the means best suited to satisfying the utility's needs; and
  - (b) may discuss all aspects of the procurement with such participants during this dialogue.
- (9) During the dialogue, a utility—
- (a) must ensure equal treatment of all participants; and
  - (b) must not provide information in a discriminatory manner which may give any participant an advantage over others.
- (10) In accordance with regulation 37 (confidentiality), a utility must not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without the candidate or tenderer's agreement.
- (11) Any agreement referred to in paragraph (10) shall not take the form of a general waiver but must be given with reference to the intended communication of specific information.
- (12) A utility may conduct a competitive dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage only by applying the award criteria specified in—
- (a) the call for competition; or
  - (b) the descriptive document.
- (13) The utility must indicate, in the contract notice or the descriptive document, whether it will use the option described in paragraph (12).
- (14) The utility shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.
- (15) When the utility has declared that the dialogue is concluded and informed the remaining participants, the utility must invite each remaining participant to submit their final tender on the basis of the solution or solutions presented and specified during the dialogue.
- (16) The final tenders—
- (a) shall contain all the elements required and necessary for the performance of the project; and
  - (b) may, subject to paragraph (17), be clarified, specified and optimised at the request of the utility.
- (17) Any clarification, specification, optimisation or additional information provided pursuant to a request referred to in paragraph (16)(b) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where such changes are likely to distort competition or cause discrimination.
- (18) A utility must assess the tenders received on the basis of the award criteria laid down in the call for competition or in the descriptive document.
- (19) At the request of the utility, and subject to paragraph (20), negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 80 (contract award criteria) may be carried out to confirm financial commitments or other terms contained in the tender in order to finalise the terms of the contract.
- (20) Any negotiation and finalisation of the terms of the contract referred to in paragraph (19) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the call for competition or in the descriptive document, where such changes are likely to distort competition or cause discrimination.
- (21) A utility may specify prizes or payments to the participants in the dialogue.

## **Innovation Partnership**

47.—(1) A utility may establish an innovation partnership with one partner or with several partners conducting separate research and development activities.

(2) The innovation partnership must aim at the development of innovative works, products or services and the subsequent purchase of the resulting works, supplies or services provided that they correspond to the performance levels and maximum costs agreed between the utility and the partners.

(3) The estimated value of works, supplies or services must not be disproportionate in relation to the investment required for their development.

(4) The innovation partnership must be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

(5) The innovation partnership must set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(6) Based on those targets, the utility may decide after each phase to—

- (a) terminate the innovation partnership; or
- (b) in the case of an innovation partnership with several partners, reduce the number of partners by terminating individual contracts,

provided that the utility has indicated in the procurement documents those possibilities and the conditions for their use.

(7) In the procurement of an innovation partnership, a utility must permit any economic operator to submit a request to participate in response to a call for competition in accordance with regulation 42(5)(b) or (c) (choice of procedures) within the time period set by the utility in accordance with this regulation.

(8) A request by an economic operator referred to in paragraph (7) must be accompanied by the information for qualitative selection that is requested by the utility.

(9) In the procurement documents, the utility must—

- (a) identify the subject matter of the procurement by providing the description of the utility's need for innovative works, products or services that cannot be met by purchasing works, products or services already available on the market;
- (b) indicate which elements of this description define the minimum requirements to be met by all tenders;
- (c) specify the award criteria; and
- (d) define the arrangements applicable to intellectual property rights.

(10) The information provided by the utility in accordance with paragraph (9) must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

(11) The minimum time period for the receipt of requests to participate—

- (a) other than in exceptional circumstances, shall be 30 days from the date on which the contract notice is sent for publication; and
- (b) shall, in any event, not be less than 15 days from that date.

(12) A utility may limit the number of suitable candidates to be invited to participate in the procedure in accordance with regulation 76(2) (criteria for qualitative selection).

(13) In selecting candidates, a utility must, in particular, apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

(14) Only those economic operators invited to do so by the utility following its assessment of the requested information may participate in the procedure and submit research and innovation

projects aimed at meeting the needs identified by the utility that cannot be met by existing solutions.

(15) A utility must negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

(16) A utility must not negotiate the minimum requirements or the award criteria referred to in paragraph (9).

(17) During the negotiations, a utility—

- (a) must ensure equal treatment of all tenderers;
- (b) must not provide information in a discriminatory manner which may give some tenderers an advantage over others;
- (c) must, in writing, inform all tenderers whose tenders have not been eliminated of any changes to the technical specifications or other procurement documents; and
- (d) must provide sufficient time following any such changes for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders as appropriate.

(18) In accordance with regulation 37 (confidentiality), a utility must not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without the candidate or tenderer's agreement.

(19) Any agreement referred to in paragraph (18) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

(20) A utility may conduct negotiations during innovation partnership procedures in successive stages in order to reduce the number of tenders to be negotiated only by applying the award criteria specified in the contract notice, the invitation to confirm interest or another procurement document.

(21) The utility must indicate in the contract notice or in another procurement document whether it will use the option described in paragraph (20).

(22) The contracts must be awarded on the sole basis of the best price-quality ratio in accordance with regulation 80 (contract award criteria).

(23) The utility must ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market.

(24) In the case of an innovation partnership with several partners, the utility must not, in accordance with regulation 37 (confidentiality), reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

(25) Any agreement referred to in paragraph (24) must not take the form of a general waiver but must be given with reference to the intended communication of specific information.

#### **Use of the negotiated procedure without prior call for competition**

**48.—**(1) A utility may award a contract following a negotiated procedure without prior publication of a call for competition in any of the following cases—

- (a) where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a call for competition, provided that the initial conditions of the contract are not substantially altered;
- (b) where the contract is—
  - (i) purely for the purpose of research, experiment, study or development; and
  - (ii) not for the purpose of securing a profit or of recovering research and development costs,

insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek the ends referred to in paragraph (ii); or

- (c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons—
  - (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - (ii) competition is absent for technical reasons;
  - (iii) the protection of exclusive rights, including intellectual property rights, but only, in the case of paragraphs (ii) and (iii), where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;
- (d) where (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by the utility, the time limits for open procedure, restricted procedure or negotiated procedure with prior call for competition cannot be complied with.

(2) For the purposes of paragraph (1)(a)—

- (a) a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents; and
- (b) a request to participate shall be considered not to be suitable where the economic operator concerned—
  - (i) has been or would be excluded under regulation 76(1) (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations); or
  - (ii) does not meet the selection criteria.

(3) For the purposes of paragraph (1)(d), the circumstances invoked to justify extreme urgency must not, in any event, be attributable to the utility.

*Specific rules based on type of contract*

(4) A utility may award a contract following a negotiated procedure without prior publication of a call for competition—

- (a) in the case of supply contracts, where the products involved are for additional deliveries by the original supplier which are intended either as—
  - (i) a partial replacement of supplies or installations; or
  - (ii) the extension of existing supplies or installations,
 where a change of supplier would require the utility to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;
- (b) for supplies quoted and purchased on a commodity market;
- (c) for purchases of supplies or services on particularly advantageous conditions, from either a supplier which is definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;
- (d) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- (e) for new works, services or both, consisting of the repetition of similar works or services entrusted to the contractor to which the utility awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded pursuant to a procedure in accordance with regulation 42(1) (choice of procedures);

- (f) for a service contract which follows a design contest organised in accordance with these Regulations and which is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of the design contest.
- (5) For the purposes of paragraph (4)(e)—
- (a) the basic project must have indicated the extent of possible additional works or services and the conditions under which they would be awarded;
  - (b) the possible use of this procedure must have been disclosed in the procurement documents; and
  - (c) the total estimated cost of these subsequent works or services must have been taken into consideration by the utility when applying regulations 15 (thresholds) and 16 (methods for calculating the estimated value) in relation to the original contract.
- (6) For the purposes of paragraph (4)(f), where there is more than one winner of the design contest all of the winners must be invited to participate in the negotiation.

## CHAPTER 2

### TECHNIQUES AND INSTRUMENTS FOR ELECTRONIC AND AGGREGATED PROCUREMENT

#### **Framework Agreements**

**49.**—(1) A utility may conclude a framework agreement, provided that the utility applies the procedures provided for in these Regulations.

(2) The term of a framework agreement must not exceed 8 years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

(3) A contract based on a framework agreement must be awarded on the basis of objective rules and criteria.

(4) For the purposes of paragraph (3), the objective rules and criteria must—

- (a) be set out in the procurement documents for the framework agreement; and
- (b) ensure equal treatment of the economic operators who are party to the framework agreement.

(5) The award of a contract referred to in paragraph (3) may include reopening the competition among those economic operators party to the framework agreement as concluded and, if so, a utility must—

- (a) set a time limit which is sufficiently long to allow tenders for each specific contract to be submitted; and
- (b) award each contract to the tenderer that has submitted the most economically advantageous tender on the basis of the award criteria set out in the specifications of the framework agreement.

(6) A utility must not use a framework agreement improperly or in such a way as to prevent, restrict or distort competition.

#### **Dynamic Purchasing Systems**

**50.**—(1) A utility may use a dynamic purchasing system for commonly used purchases the characteristics of which, as generally available on the market, meet the utility's requirements.

(2) The dynamic purchasing system must—

- (a) be operated as a completely electronic process; and
- (b) be open, throughout the period of validity of the system, to any economic operator that satisfies the selection criteria.

(3) The dynamic purchasing system may be divided into categories of works, supplies or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned.

(4) The characteristics referred to in paragraph (3) may include reference to either or both of—

- (a) the maximum allowable size of the subsequent specific contracts; and
- (b) a specific geographic area in which subsequent specific contracts will be performed.

(5) In order to procure under a dynamic purchasing system, a utility must follow the restricted procedure, and accordingly the provisions of regulation 44 (restricted procedure) apply, subject to the provisions of this regulation.

(6) Where a utility has divided the system into categories of works, supplies or services in accordance with paragraph (3), the utility must specify the applicable selection criteria for each category.

(7) A utility must admit to a dynamic purchasing system all of the candidates satisfying the selection criteria and must not limit the number of candidates to be admitted whether under regulation 76(2) (criteria for qualitative selection) or otherwise.

(8) The minimum time period for receipt of requests to participate—

- (a) other than in exceptional circumstances, shall be 30 days from the date on which—
  - (i) the contract notice is sent for publication; or
  - (ii) where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent; and
- (b) shall, in any event, be 15 days from such date.

(9) No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent.

(10) The minimum time period for receipt of tenders shall be 10 days from the date on which the invitation to tender is sent.

(11) A utility must, throughout the period of validity of the dynamic purchasing system, give any economic operator the possibility of requesting to participate in the system under the conditions referred to in paragraphs (5) to (10).

(12) A utility must finalise evaluation of such requests in accordance with the selection criteria within 10 working days following their receipt.

(13) The deadline referred to in paragraph (12) may be extended to a maximum of 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or otherwise to verify whether the selection criteria are met.

(14) Despite paragraphs (12) and (13), as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, a utility may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period.

(15) Where a utility intends to extend the evaluation period in accordance with paragraph (14), the utility must indicate in the procurement documents the length of the extended period that the utility intends to apply.

(16) A utility must inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

(17) A utility must invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with regulation 72 (invitations to candidates).

(18) Where the dynamic purchasing system has been divided into categories of works, supplies or services pursuant to paragraph (3), a utility must invite every relevant participant to submit a tender.

(19) In paragraph (18), “relevant participants” means economic operators which have been admitted to the dynamic purchasing system in relation to the category corresponding to the specific procurement concerned.

(20) For the purposes of awarding contracts under a dynamic purchasing system, a utility must—

- (a) publish a call for competition which—
  - (i) makes it clear that a dynamic purchasing system is involved; and
  - (ii) indicates the period of validity of the dynamic purchasing system;
- (b) indicate in the procurement documents at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the dynamic purchasing system, including how the system operates, the electronic equipment used and the technical connection arrangements and specifications;
- (c) indicate in the procurement documents any division into categories of works, supplies or services and the characteristics defining them; and
- (d) throughout the period of validity of the system, offer unrestricted and full direct access to the procurement documents in accordance with regulation 71 (electronic availability of procurement documents).

(21) A utility must award the contract to the tenderer that submitted the most economically advantageous tender on the basis of the award criteria set out in—

- (a) the contract notice for the dynamic purchasing system;
- (b) where a periodic indicative notice is used as a means of calling for competition, in the invitation to confirm interest; or
- (c) where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.

(22) For the purposes of paragraph (21), those criteria, where appropriate, may be formulated more precisely in the invitation to tender.

(23) A utility which, in accordance with regulation 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), applies exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations may, at any time throughout the period of validity of the dynamic purchasing system, require admitted participants to submit a renewed ESPD as provided for in regulation 60(1) of those Regulations within 5 working days from the date on which that request is transmitted.

(24) Regulation 60(7) to (10) of the Public Contracts (Scotland) Regulations applies throughout the period of validity of the dynamic purchasing system.

(25) A utility must notify the Commission of any change to the period of validity mentioned in paragraph (20)(a)(ii) using—

- (a) where the period of validity is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
- (b) where the system is terminated, a contract award notice referred to in regulation 68 (contract award notices).

(26) No charges may be made to any economic operators which are interested in or are a party to the dynamic purchasing system.

(27) All communications in the context of a dynamic purchasing system must only be made by electronic means in accordance with regulation 38(1) to (7) and (11) to (20) (rules applicable to communication).

## **Electronic Auctions**

**51.**—(1) A utility may use electronic auctions, in which economic operators present one or both of the following—

- (a) new prices, revised downwards;

- (b) new values concerning certain elements of tenders.
- (2) A utility must structure the electronic auction as a repetitive electronic process, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.
- (3) Electronic auctions must not be used for works or service contracts which have as their subject-matter intellectual activities (such as the design of works) which cannot be ranked using automatic evaluation methods.
- (4) A utility which decides to hold an electronic auction must state that fact in the—
- (a) contract notice;
  - (b) the invitation to confirm interest; or
  - (c) where a notice on the existence of a qualification system is used as a means of calling for competition, in the invitation to tender.
- (5) In open or restricted procedures or negotiated procedures with a prior call for competition, when the content of the procurement documents, in particular the technical specifications, can be established with precision, a utility may—
- (a) decide that the award of a contract shall be preceded by an electronic auction;
  - (b) hold an electronic auction—
    - (i) on the reopening of competition among the parties to a framework agreement as provided for in regulation 49(5) (framework agreements); or
    - (ii) on the opening for competition of contracts to be awarded under a dynamic purchasing system.
- (6) The electronic auction must be based—
- (a) on prices only where the contract is awarded on the basis of price only; and
  - (b) on prices, on the new values of the features of the tenders indicated in the procurement documents or on both, where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost effectiveness approach.
- (7) Where a utility has decided to hold an electronic auction, the procurement documents must include at least the following—
- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
  - (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
  - (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
  - (d) relevant information concerning the electronic auction process;
  - (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding; and
  - (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.
- (8) Before proceeding with an electronic auction, a utility must make a full initial evaluation of the tenders in accordance with the award criteria and the weighting fixed for them.
- (9) A tender must be considered admissible where—
- (a) it has been submitted by a tenderer who has not been excluded pursuant to regulation 76(1) (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations) and who meets the selection criteria; and
  - (b) it is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

- (10) A tender must be considered to be irregular for the purposes of paragraph (9)(b) where—
- (a) it does not comply with the procurement documents;
  - (b) it was received late;
  - (c) there is evidence of collusion or corruption; or
  - (d) it has been found by the utility to be abnormally low.
- (11) A tender must be considered to be unacceptable for the purposes of paragraph (9)(b) where—
- (a) it was submitted by a tenderer which does not have the required qualifications; or
  - (b) the price tendered exceeds the utility's budget as determined and documented prior to the commencement of the procurement.
- (12) A tender must be considered unsuitable for the purpose of paragraph (9)(b) where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the utility's needs and requirements as specified in the procurement documents.
- (13) All tenderers that have submitted admissible tenders must be invited simultaneously, by electronic means, to participate in the electronic auction using, as of the date and time specified in the invitation, the technical connection arrangements referred to in accordance with the instructions set out in the invitation.
- (14) The electronic auction may take place in a number of successive phases.
- (15) The electronic auction must not start sooner than 2 working days after the date on which invitations are sent out.
- (16) The invitation must be accompanied by the outcome of a full evaluation of the relevant tender, carried out in accordance with the weighting provided for in regulation 80(9) to (11) (contract award criteria).
- (17) The invitation must also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices or new values submitted, or both.
- (18) The formula referred to in paragraph (17) must incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in other procurement documents.
- (19) For the purpose of paragraph (18), any ranges of weightings must be reduced beforehand to a specified value.
- (20) Where variants are authorised in accordance with regulation 62 (variants) a separate formula must be provided for each variant.
- (21) Throughout each phase of an electronic auction the utility must instantaneously communicate to all tenderers at least sufficient information to enable the tenderers to ascertain their relative rankings at any moment.
- (22) A utility may, where this has been previously indicated, communicate information concerning other prices or values submitted.
- (23) A utility may also, at any time, announce the number of participants in the current phase of the auction.
- (24) In no case, however, may a utility disclose the identities of the tenderers during any phase of an electronic auction.
- (25) A utility must close an electronic auction—
- (a) at the previously indicated date and time;
  - (b) when the utility receives no more new prices or new values which meet the requirements concerning minimum differences specified in accordance with paragraph (7)(e), provided that the utility has previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when all of the previously indicated number of phases in the auction have been completed.

(26) Where the utility intends to close an electronic auction in accordance with paragraph (25)(c), whether or not in combination with any arrangements laid down in paragraph (25)(b), the utility must indicate in the invitation to participate in the auction the timetable for each phase of the auction.

(27) After closing an electronic auction, a utility shall award the contract in accordance with regulation 80 (contract award criteria) on the basis of the results of the electronic auction.

### **Electronic catalogues**

**52.**—(1) Where the use of electronic means of communication is required, a utility may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.

(2) Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

(3) Electronic catalogues must be established by the candidates or tenderers with a view to participating in a given procurement in accordance with the technical specifications and format established by the utility.

(4) Electronic catalogues must also comply with the requirements for electronic communication tools set out in regulation 38 (rules applicable to communication) as well as with any additional requirements set by the utility in accordance with that regulation.

(5) Where the presentation of tenders in the form of electronic catalogues is accepted or required, a utility must—

- (a) state that to be the case in—
  - (i) the contract notice;
  - (ii) the invitation to confirm interest; or
  - (iii) where the means of calling for competition is a notice on the existence of a qualification system, the invitation to tender or negotiate; and
- (b) indicate in the procurement documents all the necessary information pursuant to regulation 38(16) to (25) (rules applicable to communication) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.

(6) Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, a utility may provide that the reopening of competition for a specific contract is to take place on the basis of updated catalogues.

(7) Where a utility requires updated catalogues in accordance with paragraph (6), the utility must—

- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the contract in question; or
- (b) notify tenderers that the utility intends to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question, provided that the use of that method has been indicated in the procurement documents for the framework agreement.

(8) Where a utility reopens competition for a specific contract in accordance with paragraph (7)(b), the utility must—

- (a) notify tenderers of the date and time at which the utility intends to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question; and
- (b) allow tenderers to refuse such collection of information.

(9) A utility must allow an adequate period of time between the notification referred to in paragraph (8)(a) and the collection of information.

(10) Before awarding the contract, a utility must present the collected information to the tenderer concerned and give the tenderer the opportunity to contest or confirm that the tender thus constituted does not contain any material errors.

(11) A utility may award a contract based on a dynamic purchasing system by requiring that offers for a specific contract are to be presented in the format of an electronic catalogue.

(12) A utility may also award a contract based on a dynamic purchasing system in accordance with paragraphs (7)(b) and (8) to (10) provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the utility.

(13) For the purpose of paragraph (12), the catalogue must be completed subsequently by the candidates, when they are informed of the utility's intention to constitute tenders by means of the procedure set out in paragraph (7)(b).

### **Centralised purchasing activities and central purchasing bodies**

**53.**—(1) A utility may acquire supplies and services from a central purchasing body offering the centralised purchasing activity referred to in regulation 2(1).

(2) A utility may acquire works, supplies and services, or any one or more of them, by using—

- (a) a contract awarded to the utility by a central purchasing body;
- (b) a dynamic purchasing system operated by a central purchasing body; or
- (c) a framework agreement concluded by a central purchasing body offering the centralised purchasing activity.

(3) Where a dynamic purchasing system which is operated by a central purchasing body may be used by another utility, this must be mentioned in the call for competition setting up that dynamic purchasing system.

(4) Subject to paragraph (5), where a utility makes an acquisition in accordance with paragraphs (1) or (2), the utility fulfils its obligations under these Regulations in relation to such acquisition.

(5) A utility referred to in paragraph (4) is responsible for fulfilling the obligations imposed by these Regulations in respect of any part of the procedure that the utility conducts itself, such as—

- (a) awarding a contract under a dynamic purchasing system which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body.

(6) A procurement conducted by a central purchasing body must be performed using electronic means of communication, in accordance with the requirements set out in regulation 38 (rules applicable to communication).

(7) A utility may, without applying the procedures provided for in these Regulations, award a service contract for the provision of centralised purchasing activities to a central purchasing body.

(8) A service contract referred to in paragraph (7) may also include the provision of an ancillary purchasing activity.

(9) Procurement carried out by a central purchasing body in order to perform a centralised purchasing activity shall be deemed to be procurement for the pursuit of an activity referred to in regulations 8 to 14.

### **Occasional joint procurement**

**54.**—(1) Two or more utilities may agree to perform a certain specific procurement jointly.

(2) A utility shall be jointly responsible for fulfilling their obligations under these Regulations where—

- (a) the conduct of a procurement in its entirety is carried out jointly in the name of and on behalf of all the utilities concerned; or
- (b) one utility manages the procedure, acting on its own behalf and on behalf of the other utilities concerned.

(3) Where the conduct of a procurement is not in its entirety carried out in the name of and on behalf of the utilities concerned—

- (a) the utilities shall be jointly responsible only for those parts carried out jointly; and
- (b) each utility shall have sole responsibility for fulfilling its obligations under these Regulations in respect of the parts it conducts in its own name and on its own behalf.

### **Procurement involving utilities from different member States**

**55.**—(1) Without prejudice to regulations 27 to 30, a utility may act jointly with a utility from another member State in the award of a contract by using one of the means provided for in this regulation.

(2) A utility must not use the means provided for in this regulation for the purpose of avoiding the application of mandatory public law provisions in the applicable law of the jurisdiction to which the utility is subject, where those provisions are in conformity with EU law.

(3) A utility may use centralised purchasing activities offered by a central purchasing body located in another member State.

(4) A utility may only use the provision of centralised purchasing activities by a central purchasing body located in another member State where they are conducted in accordance with the national provisions of the member State where the central purchasing body is located.

(5) The national provisions of the member State where the central purchasing body is located also apply to—

- (a) the award of a contract under a dynamic purchasing system; and
- (b) the conduct of a reopening of competition under a framework agreement.

(6) In the circumstances set out in paragraph (7), several utilities from different member States may—

- (a) jointly award a contract, conclude a framework agreement or operate a dynamic purchasing system; and
- (b) award contracts based on the framework agreement or award contracts under the dynamic purchasing system.

(7) The circumstances referred to in paragraph (6) are that—

- (a) unless the necessary elements have been regulated by an international agreement concluded between the member States concerned, the participating utilities have concluded an agreement that determines—
  - (i) the responsibilities of the parties and the relevant applicable national provisions; and
  - (ii) the internal organisation of the procurement, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts; and
- (b) the allocation of responsibilities and the applicable national law have been referred to in the procurement documents.

(8) When determining responsibilities and the applicable national law as referred to in paragraph (7)(a)(i), the participating utilities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of any of their respective member States.

(9) A participating utility fulfils its obligations under these Regulations when it purchases works, supplies or services from a utility which is responsible for the procurement.

(10) Utilities from different member States may set up a joint entity for the purpose of paragraph (1), subject to compliance with paragraph (11).

(11) The participating utilities must, before undertaking any given procurement, by a decision of the competent body of the joint entity, agree on the applicable national procurement rules of one of the following—

- (a) the member State where the joint entity has its registered office; or
- (b) the member State where the joint entity is carrying out its activities.

(12) The agreement referred to in paragraph (11) may either apply for an undetermined period, when fixed in the constitutive act of the joint entity, or may be limited to a certain period of time, to certain types of contract or to one or more individual contract awards.

(13) The other provisions of these Regulations apply to procurement by the joint entity only where they are the national provisions applicable in accordance with paragraph (11).

(14) In this regulation—

“central purchasing body located in another member State” means any person which is a central purchasing body for the purposes of paragraph (12) of Article 2 of the Utilities Contracts Directive in the member State in which it is located;

“joint entity” includes European groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council on a European grouping of territorial cooperation<sup>(a)</sup> and other entities established under EU law; and

“utility from another member State” means any person which is a contracting entity for the purposes of Article 4 of the Utilities Contracts Directive in a member State other than the United Kingdom; and references to “participating utilities” to the extent that they are from another member State shall be interpreted accordingly.

## CHAPTER 3

### CONDUCT OF THE PROCEDURE

#### SECTION 1

##### *Preparation*

#### **Preliminary market consultation**

**56.**—(1) Before commencing a procurement, a utility may conduct a market consultation with a view to preparing the procurement and informing economic operators of the utility’s procurement plans and requirements.

(2) For this purpose, a utility may act as it considers appropriate, including seeking or accepting advice from independent experts or authorities or from market participants.

(3) Such advice may be used in the planning and conduct of the procurement, provided that it does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

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(a) OJ L 210, 31.7.2006, p.19.

### **Prior involvement of candidates or tenderers**

**57.**—(1) A utility must take appropriate measures to ensure that competition is not distorted by the participation of a candidate or tenderer where that candidate or tenderer, or an undertaking related to that candidate or tenderer—

- (a) has advised the utility, whether in the context of regulation 56 (preliminary market consultation) or not; or
- (b) has otherwise been involved in the preparation of the procurement.

(2) Such measures must include—

- (a) the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement; and
- (b) the fixing of adequate time limits for the receipt of tenders.

(3) A candidate or tenderer in a situation referred to in paragraph (1) may only be excluded from the procedure for the purposes of paragraph (1) where there are no other means to ensure compliance with the duty referred to in regulation 34(1) (principles of procurement).

(4) Prior to any such exclusion, a candidate or tenderer must be given the opportunity to prove that their involvement in preparing the procurement is not capable of distorting competition.

(5) The measures taken must be documented in the report referred to in regulation 96 (reporting and documentation requirements).

### **Technical specifications**

**58.**—(1) The technical specifications must—

- (a) be set out in the procurement documents; and
- (b) lay down the characteristics required of any works, supply or service.

(2) In the case of a works contract, technical specifications define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended by the utility.

(3) The characteristics referred to in paragraph (2) may include—

- (a) levels of environmental and climate performance;
- (b) design for all requirements (including accessibility for disabled persons) and conformity assessment;
- (c) performance, safety or dimensions, including the procedures concerning quality assurance;
- (d) terminology;
- (e) symbols;
- (f) testing and test methods;
- (g) packaging, marking and labelling;
- (h) user instructions;
- (i) production processes and methods at any stage of the life cycle of the works;
- (j) rules relating to design and costing and the test, inspection and acceptance conditions for works; and
- (k) methods or techniques of construction and all other technical conditions which the utility is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

(4) In the case of a supply or service contract, the required characteristics may include—

- (a) quality levels;
- (b) environmental and climate performance levels;

- (c) design for all requirements (including accessibility for disabled persons) and conformity assessment;
  - (d) performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold;
  - (e) terminology;
  - (f) symbols;
  - (g) testing and test methods;
  - (h) packaging, marking and labelling;
  - (i) user instructions;
  - (j) production processes and methods at any stage of the life cycle of the supply or service; and
  - (k) conformity assessment procedures.
- (5) In the case of any contract, the required characteristics may also refer to—
- (a) the specific process or method of production or provision of the requested works, supplies or services;
  - (b) a specific process for another stage of its life cycle,
    - even where such factors do not form part of the contract’s material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.
- (6) The technical specifications may also specify whether the transfer of intellectual property rights will be required.
- (7) Where the subject of the procurement is intended for use by natural persons, whether the general public or staff of the utility, the technical specifications must, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.
- (8) Where mandatory accessibility requirements are adopted by a legal act of the EU, technical specifications must, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.
- (9) Technical specifications must afford equal access of economic operators to the procurement and must not have the effect of creating unjustified obstacles to the opening up of procurement to competition.
- (10) Without prejudice to mandatory national technical rules, to the extent that they are compatible with EU law, the technical specifications must be formulated—
- (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow the utility to award the contract;
  - (b) by reference to any of the following technical specifications in the following order of precedence—
    - (i) national standards transposing European standards;
    - (ii) European Technical Assessments;
    - (iii) common technical specifications;
    - (iv) international standards;
    - (v) other technical reference systems established by the European standardisation bodies; or
    - (vi) when none of the above exist, national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies,
 but each reference must be accompanied by the words ‘or equivalent’;

- (c) in terms of performance or functional requirements as referred to in sub-paragraph (a), with reference to the technical specifications referred to in sub-paragraph (b) as a means of presuming conformity with such performance or functional requirements; or
- (d) by reference to the technical specifications referred to in sub-paragraph (b) for certain characteristics and by reference to the performance or functional requirements referred to in sub-paragraph (a) for other characteristics.

(11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—

- (a) a specific make or source;
- (b) a particular process which characterises the products or services provided by a specific economic operator; or
- (c) trade marks, patents, types, or a specific origin or production.

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances—

- (a) where justified by the subject-matter of the contract;
- (b) on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph (10) is not possible, in which case the reference must be accompanied by the words “or equivalent”.

(13) Where a utility formulates technical specifications in terms of performance or functional requirements in accordance with paragraph (10)(a), it must not reject a tender for works, supplies or services which complies with a technical specification of a kind mentioned in paragraph (10)(b)(i) to (v), where those specifications address the performance or functional requirements which it has laid down.

(14) Where a utility formulates technical specifications in accordance with paragraph (10)(b), it must not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, where the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 60 (test reports, certificates and other means of proof), that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.

(15) In its tender, the tenderer must prove by any appropriate means, including those referred to in regulation 60 (test reports, certificates and other means of proof), that the works, supply or service in compliance with the standard meets the performance or functional requirements of the utility.

## **Labels**

**59.—**(1) Where a utility intends to purchase works, supplies or services with specific environmental, social or other characteristics the utility may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, supplies or services correspond to the required characteristics, provided that all of the following conditions are fulfilled—

- (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services;
- (b) the label requirements are based on objectively verifiable and non-discriminatory criteria;
- (c) the label is established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- (d) the label is accessible to all interested parties; and
- (e) the label requirements are set by a third party over whom the economic operator applying for the label cannot exercise a decisive influence.

(2) Where a utility does not require the works, supplies or services to meet all of the label requirements, the utility must indicate which label requirements are required.

(3) A utility requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

(4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the utility, or an equivalent label, within the relevant time limits for reasons that are not attributable to that economic operator, the utility must accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the utility.

(5) Where a label fulfils the conditions mentioned in paragraph (1)(b) to (e) but also sets out requirements not linked to the subject-matter of the contract, a utility must not require the label but may define the technical specification by reference to those of the detailed specifications of that label or, parts of it where necessary, that are linked to the subject-matter of the contract and are appropriate to define characteristics of that subject-matter.

### **Test reports, certificates and other means of proof**

**60.**—(1) A utility may require an economic operator to provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

(2) Where a utility requires the submission of certificates drawn up by a specific conformity assessment body, certificates from other equivalent conformity assessment bodies must also be accepted by the utility.

(3) In paragraphs (1) and (2), “conformity assessment body” means a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93(a).

(4) Where the economic operator concerned has no access to the certificates or test reports referred to in paragraphs (1) and (2), or no possibility of obtaining them within the relevant time limits, a utility must accept appropriate means of proof other than those referred to in paragraphs (1) and (2), such as a technical dossier of the manufacturer, provided that—

- (a) the lack of access is not attributable to the economic operator concerned; and
- (b) the means of proof provided by the economic operator concerned proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

### **Communication of technical specifications**

**61.**—(1) On request from an economic operator interested in obtaining a contract, a utility must make available—

- (a) the technical specifications regularly referred to in their works, supplies or services contracts; or
- (b) the technical specifications which they intend to apply to contracts for which the call for competition is a periodic indicative notice.

(2) Subject to paragraph (3), the technical specifications referred to in paragraph (1) must be made available by electronic means of communication through unrestricted and full direct access free of charge.

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(a) OJ L 218, 13.8.2008, p.30.

(3) Technical specifications must be transmitted by means other than electronic means where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered—

- (a) for one of the reasons set out in regulations 38(3) or (5) (rules applicable to communication); or
- (b) because the utility intends to apply regulation 37(3) (confidentiality).

(4) Where the technical specifications are based on documents available by electronic means through unrestricted and full direct access free of charge to interested economic operators, the inclusion of a reference to those documents must be sufficient.

## **Variants**

**62.**—(1) A utility may authorise or require tenderers to submit variants which meet the minimum requirements laid down by the utility.

(2) A utility must indicate in the procurement documents whether or not they authorise or require variants.

(3) A utility authorising or requiring variants must state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where the economic operator also submits a tender which is not a variant.

(4) A utility must not take into consideration a variant which—

- (a) has not been authorised or required;
- (b) is not linked to the subject matter of the contract; or
- (c) does not meet the minimum requirements laid down by the utility.

(5) A utility must ensure that the award criteria can be applied to variants meeting those minimum requirements as well as to tenders which are not variants.

(6) In a procedure for awarding a supply contract or service contract, a utility that has authorised or required variants must not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a supply contract or a supply contract rather than a service contract.

## **Division of contracts into lots**

**63.**—(1) A utility may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.

(2) Where a utility decides to award a contract in the form of separate lots it must indicate in the contract notice, in the invitation to confirm interest, or, where the means of a call for competition is a notice on the existence of a qualification system, in the invitation to tender or negotiate, whether tenders may be submitted for one, for several or for all of the lots.

(3) A utility may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest, to tender or to negotiate.

(4) A utility must indicate in the procurement documents the objective and non-discriminatory criteria or rules it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

(5) Where more than one lot may be awarded to the same tenderer, a utility may award contracts combining several or all lots where the utility has—

- (a) specified in the contract notice or in the invitation to confirm interest, to tender or to negotiate that it reserves the possibility of doing so; and

- (b) indicated the lots or groups of lots that may be combined.

### **Setting time limits**

**64.**—(1) When fixing the time limits for the receipt of tenders and requests to participate, a utility must take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in regulations 43 to 47.

(2) Where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the procurement documents, the time limits for the receipt of tenders, which shall be longer than the minimum time limits set out in regulations 43 to 47, must be fixed so that all economic operators concerned may be aware of all the information needed to produce tenders.

(3) A utility must extend the time limits for the receipt of tenders, so that all economic operators concerned may be aware of all the information needed to produce tenders, where—

- (a) for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest 6 days before the time limit fixed for the receipt of tenders; or
- (b) significant changes are made to the procurement documents.

(4) In the case of an accelerated open procedure, the period mentioned in paragraph (3)(a) shall be 4 days.

(5) The length of the extension given pursuant to paragraph (3) must be proportionate to the importance of the information or change.

(6) A utility is not required to extend the time limit where—

- (a) additional information has not been requested in good time; or
- (b) the additional information requested is of insignificant importance with a view to preparing responsive tenders.

## SECTION 2

### *Publication and transparency*

### **Periodic indicative notices**

**65.**—(1) A utility may make known its intentions of a planned procurement through the publication of a periodic indicative notice.

(2) A periodic indicative notice must contain the information set out in section I of Part A of Annex VI to the Utilities Contracts Directive.

(3) A utility wishing to publish a periodic indicative notice must—

- (a) send it for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level); or
- (b) publish it on the utility's buyer profile in accordance with regulation 70 (publication at national level).

(4) Where the utility intends to publish the periodic indicative notice on its buyer profile, the utility must send for publication, in accordance with regulation 69 (form and manner of sending notices for publication at EU level), a notice of the publication on its buyer profile.

(5) The notice of publication referred to in paragraph (4) must contain the information set out in Part B of Annex VI to the Utilities Contracts Directive.

(6) Where a utility uses a periodic indicative notice as a call for competition in respect of either a restricted procedure or a negotiated procedure with prior call for competition, the notice must—

- (a) refer specifically to the works, supplies or services that will be the subject of the contract to be awarded;

- (b) indicate that the contract will be awarded by restricted procedure or negotiated procedure without further publication of a call for competition and invite interested economic operators to express their interest;
- (c) contain, in addition to the information set out in section I of Part A of Annex VI to the Utilities Contracts Directive, the information set out in section II of that Part; and
- (d) have been sent for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) between 35 days and 12 months prior to the date on which an invitation to confirm interest is sent for the purposes of regulation 72(3) (invitations to candidates).

(7) In addition to sending a periodic indicative notice used for the purpose mentioned in paragraph (6) for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level), a utility may publish such a notice on its buyer profile in accordance with regulation 70 (publication at national level).

(8) Subject to paragraph (9), the period covered by a periodic indicative notice must be a maximum of 12 months from the date on which the notice is sent for publication.

(9) In the case of a contract for social and other specific services referred to in Schedule 2 (social and other specific services), a periodic indicative notice referred to in regulation 89(1)(b) (publication of notices) may cover a period which is longer than 12 months from the date on which the notice is sent for publication.

#### **Notices on the existence of a qualification system**

**66.**—(1) This regulation applies where a utility chooses to set up a qualification system in accordance with regulation 75 (qualification systems).

(2) The qualification system must be the subject of a notice which includes the information set out in Annex X to the Utilities Contracts Directive, indicating the purpose of the qualification system and how to have access to the rules concerning its operation.

(3) The utility must—

- (a) indicate the period of validity of the qualification system in the notice on the existence of the system; and
- (b) notify the EU Publications Office of any change in the period of validity.

(4) The notification in paragraph (3)(b) must be made by using the following standard forms—

- (a) where the period of validity is changed without terminating the system, the form for notices on the existence of qualification systems; and
- (b) where the system is terminated, a contract award notice referred to in regulation 68 (contract award notices).

#### **Contract notices**

**67.** A contract notice must contain the information set out in the relevant part of Annex XI to the Utilities Contracts Directive and must be sent for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

#### **Contract award notices**

**68.**—(1) Not later than 30 days after the award of a contract or conclusion of a framework agreement, a utility must send for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) a contract award notice on the results of the procurement.

(2) A contract award notice must contain the information set out in Annex XII to the Utilities Contracts Directive.

(3) Where the call for competition for the contract concerned has been made in the form of a periodic indicative notice and the utility has decided that it will not award further contracts during

the period covered by the periodic indicative notice, the contract award notice must contain a specific indication to that effect.

(4) In accordance with paragraph (5), a utility must send for publication a contract award notice in respect of the award of a supply, service or works contract based on a framework agreement if the estimated value of the contract under the framework is equal to or greater than the threshold referred to in regulation 15(1) (thresholds) applicable to that type of contract.

(5) The utility must send such notices for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) on a quarterly basis, within 30 days of the end of each quarter.

(6) In the case of the award of a contract based upon a dynamic purchasing system, a utility must either—

- (a) send for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) a contract award notice within 30 days after the award of each such contract; or
- (b) group notices referred to in sub-paragraph (a) on a quarterly basis, in which case the utility must send for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level) the grouped notices within 30 days of the end of each quarter.

(7) A utility may withhold from publication information on the contract award or the conclusion of the framework agreement where the release of the information—

- (a) would impede law enforcement or otherwise be contrary to the public interest;
- (b) would prejudice the commercial interests of any person; or
- (c) might prejudice fair competition between economic operators.

(8) In the case of contracts for research and development services, the information in paragraph (2) concerning the nature and quantity of the services may be limited to—

- (a) where the contract has been awarded by a negotiated procedure without a call for competition in accordance with regulation 48(1)(b) (use of the negotiated procedure without prior call for competition), the indication “R & D Services”; and
- (b) where the contract has been awarded by a procedure with a call for competition, information at least as detailed as was indicated in the notice that was used as a means of calling for competition.

### **Form and manner of sending notices for publication at EU level**

**69.**—(1) The notices required by regulations 65 to 68 to be sent for publication in accordance with this regulation must—

- (a) be sent by electronic means to the EU Publications Office for publication; and
- (b) where the Commission has published standard forms for such notices, be set out using such forms.

(2) A utility must ensure that it is able to supply proof of the dates on which notices are sent to the EU Publications Office for publication.

(3) Where the EU Publications Office has given the utility confirmation of the receipt of the notice and of the publication of the information sent, indicating the date of that publication, that confirmation shall constitute proof of publication.

(4) A utility may send notices in respect of works, supply or service contracts to the EU Publications Office for publication even where the utility is not required to do so by these Regulations, provided such notices are sent by electronic means.

## **Publication at national level**

**70.**—(1) In addition to the publication of the notices referred to in regulations 65 to 68 by the EU Publications Office, a utility may publish the information contained in such notices on the internet on a buyer profile.

(2) A buyer profile may also include—

- (a) periodic indicative notices which are published on it pursuant to regulation 65(3)(b) (periodic indicative notices);
- (b) information on on-going invitations to tender, scheduled purchases, contracts concluded, procedures cancelled; and
- (c) any useful general information, such as a contact point, telephone and fax number, postal address and e-mail address.

(3) The notices referred to in regulations 65 to 68, and the information contained in them, must not be published at national level before the notices are published by the EU Publications Office.

(4) Notwithstanding paragraph (3), publication may take place at national level where a utility has not been notified of the publication by the EU Publications Office within 48 hours after confirmation of the receipt of the notice in accordance with Article 71(5) of the Utilities Contracts Directive.

(5) A notice published at national level must not contain information other than that contained in the notice sent to the EU Publications Office or published on a buyer profile, but must indicate the date of sending of the notice to the EU Publications Office or its publication on the buyer profile.

(6) Where a periodic indicative notice is to be published on a buyer profile—

- (a) the periodic indicative notice may not be so published before the utility sends to the EU Publications Office the notice referred to in regulation 65(4) (periodic indicative notices); and
- (b) the periodic indicative notice must indicate the date of that sending.

## **Electronic availability of procurement documents**

**71.**—(1) Subject to paragraph (2), a utility must offer on the internet unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with regulation 69 (form and manner of sending notices for publication at EU level) or the date on which an invitation to confirm interest was sent.

(2) Where the means of calling for competition is a notice on the existence of a qualification system, the access referred to in paragraph (1) must be offered as soon as possible and at the latest when the invitation to tender or to negotiate is sent.

(3) The text of the notice or the invitation must specify the internet address at which the procurement documents are accessible.

(4) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for one of the reasons set out in regulation 38(3) (rules applicable to communication), a utility may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by means other than electronic means in accordance with the periods mentioned in paragraphs (7) and (8).

(5) Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered because a utility intends to apply regulation 37(3) (confidentiality), the utility must indicate, in one of the following, which measures, aimed at protecting the confidential nature of the information, the utility requires and how access can be obtained to the documents—

- (a) the notice;
- (b) the invitation to confirm interest; or
- (c) where the means of calling for competition is a notice on the existence of a qualification system, the procurement documents.

(6) Where paragraph (4) or (5) applies, the time limit for the submission of tenders must be extended by 5 days, except—

- (a) in a case of duly substantiated urgency referred to in regulation 43(5) (open procedure); or
- (b) where the time limit is set by mutual agreement in accordance with regulation 44(6) (restricted procedure) or 45(6) (negotiated procedure with prior call for competition).

(7) Provided that it has been requested in good time, a utility must supply to all tenderers taking part in the procurement additional information relating to the specifications and any supporting documents, not later than 6 days before the time limit fixed for the receipt of tenders.

(8) In the case of an accelerated open procedure, the period mentioned in paragraph (7) shall not be later than 4 days before the time limit fixed for the receipt of tenders.

### **Invitations to candidates**

**72.**—(1) In a restricted procedure, a competitive dialogue procedure, an innovation partnership and a negotiated procedure with prior call for competition, an invitation by a utility to selected candidates or to participants to submit a tender must be issued simultaneously and in writing.

(2) In a competitive dialogue procedure, an innovation partnership and a negotiated procedure with or without prior call for competition, an invitation by a utility to selected candidates to participate must be issued simultaneously and in writing.

(3) Where the call for competition is made by means of a periodic indicative notice, as referred to in regulation 42(5)(a) (choice of procedures), the utility must, simultaneously and in writing, invite all economic operators which have expressed their interest following the publication of the periodic indicative notice to confirm their interest in writing.

(4) The invitations required by paragraphs (1) to (3) must—

- (a) include a reference to the electronic address at which the procurement documents have been made directly available by electronic means; or
- (b) be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge, for the reasons referred to in regulation 71(4) or (5) (electronic availability of procurement documents) and have not already been made otherwise available.

(5) The invitations required by paragraphs (1) and (2) must also contain at least the following information—

- (a) where tenders are to be submitted, the deadline for the receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up;
- (b) in the case of competitive dialogue, the date and the address set for the start of consultation and the language or languages to be used;
- (c) a reference to the call for competition published;
- (d) an indication of any documents to be attached;
- (e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;
- (f) the relative weighting of criteria for the award of the contract or, where appropriate, the order of importance of such criteria, where they are not given in the contract notice, the notice on the existence of a qualification system or the specifications.

(6) An invitation to confirm interest referred to in paragraph (3) must also contain at least the following information—

- (a) the nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising such options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;

- (b) the type of procedure, namely restricted or negotiated procedure;
- (c) where applicable, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;
- (d) where electronic access cannot be offered, the address and closing date for the submission of requests for procurement documents and the languages in which they are to be drawn up;
- (e) the address of the utility;
- (f) economic and technical conditions, financial guarantees and information required from economic operators;
- (g) the form of the contract which is the subject of the invitation to tender, namely purchase, lease, hire or hire-purchase, or any combination of these; and
- (h) the contract award criteria and their relative weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the periodic indicative notice or the specifications or in the invitation to tender or to negotiate.

### **Informing applicants for qualification, candidates and tenderers**

**73.**—(1) A utility must as soon as possible after reaching a decision concerning the award of a contract, the conclusion of a framework agreement or admittance to a dynamic purchasing system, inform each candidate and tenderer of the decision reached.

(2) Information provided in accordance with paragraph (1) must, where applicable, include the grounds for any decision—

- (a) not to conclude a framework agreement;
- (b) not to award a contract for which there has been a call for competition;
- (c) to recommence the procedure; or
- (d) not to implement a dynamic purchasing system.

(3) On request from the candidate or tenderer concerned, the utility must as soon as possible, and in any event within 15 days from receipt of a written request, inform—

- (a) any unsuccessful candidate of the reasons for the rejection of its request to participate;
- (b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in regulation 58(13) and (14) (technical specifications), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements;
- (c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement; and
- (d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

(4) A utility may decide to withhold certain information referred to in paragraphs (2) and (3), where the release of such information—

- (a) would impede law enforcement or otherwise be contrary to the public interest;
- (b) would prejudice the commercial interests of any person; or
- (c) might prejudice fair competition between economic operators.

(5) A utility which establishes and operates a system of qualification must—

- (a) inform applicants of its decision as to qualification within a period of 6 months;
- (b) if the decision as to qualification will take longer than 4 months from the presentation of an application, inform the applicant within 2 months of the application of—
  - (i) the reasons justifying the longer period; and
  - (ii) the date by which the application will be accepted or refused;

- (c) inform applicants whose qualification is refused of the refusal decision and the reasons for that decision as soon as possible and no more than 15 days after the date of the refusal decision.
- (6) A utility which establishes and operates a system of qualification must—
- (a) base its reasons for decisions as to qualification on the criteria for qualification referred to in regulation 75(3) to (5) (qualification systems); and
  - (b) only bring the qualification of an economic operator to an end for reasons based on the criteria for qualification referred to in regulation 75(3) to (5) (qualification systems).
- (7) Any intention to bring the qualification of an economic operator to an end must be notified in writing to the economic operator at least 15 days before the date on which the qualification is due to end, together with the reasons justifying the proposed action.

### SECTION 3

#### *Choice of participants and award of contracts*

#### **General principles**

- 74.**—(1) For the purpose of selecting participants in their procurement, a utility—
- (a) which has provided rules and criteria for the exclusion of tenderers or candidates in accordance with regulations 76(1) (criteria for qualitative selection) or 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), must exclude economic operators identified in accordance with such rules and fulfilling such criteria;
  - (b) must select tenderers and candidates in accordance with the objective rules and criteria mentioned in regulations 76 (criteria for qualitative selection) and 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations);
  - (c) must, where appropriate and in accordance with regulation 76(2) and (3) (criteria for qualitative selection), reduce the number of candidates selected in accordance with subparagraphs (a) and (b) in—
    - (i) restricted procedures;
    - (ii) negotiated procedures with a call for competition;
    - (iii) competitive dialogues; and
    - (iv) innovation partnerships.
- (2) When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in a procurement for the specific contracts which are the subject of the call for competition, a utility must—
- (a) qualify economic operators in accordance with regulation 75 (qualification systems);
  - (b) apply to such qualified economic operators those provisions of paragraph (1) that are relevant to restricted or negotiated procedures, to competitive dialogues or to innovation partnerships.
- (3) When selecting participants for a restricted or negotiated procedure, a competitive dialogue or an innovation partnership, in reaching its decision as to qualification or when the criteria and rules are being updated, a utility must not—
- (a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;
  - (b) require tests or evidence which would duplicate objective evidence already available.
- (4) Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous, or where specific documents are missing, a utility may request the economic operator concerned to submit, supplement, clarify or complete the relevant information

or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

(5) A utility must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in regulations 80 (contract award criteria) and 82 (abnormally low tenders), taking into account regulation 62 (variants).

(6) A utility may decide not to award a contract to, or conclude a framework agreement with, the tenderer submitting the most economically advantageous tender where the utility has established that the tender does not comply with applicable obligations in the fields of environmental, social and employment law established by EU law, national law, collective agreements or by the international environmental, social and employment law provisions listed in Annex XIV to the Utilities Contracts Directive as amended from time to time.

(7) In open procedures, a utility may decide to examine tenders before verifying the suitability of tenderers, provided that the relevant provisions of regulations 74 to 82 are observed.

#### SUB-SECTION 1

#### *Qualification and qualitative selection*

#### **Qualification systems**

**75.**—(1) A utility may establish and operate a system of qualification of economic operators.

(2) A utility which establishes or operates a system of qualification must ensure that economic operators are at all times able to request qualification.

(3) The system under paragraph (1) may involve different qualification stages.

(4) A utility must establish objective rules and criteria for—

- (a) the exclusion and selection of economic operators requesting qualification; and
- (b) the operation of the qualification system, covering matters such as—
  - (i) inscription in the system;
  - (ii) periodic updating of the qualifications, if any; and
  - (iii) the duration of the system.

(5) Where the rules and criteria referred to in paragraph (4) include technical specifications, regulations 58 to 60 apply.

(6) The rules and criteria referred to in paragraph (4)—

- (a) must be made available to economic operators upon request; and
- (b) may be updated as required and, if so, must be communicated to interested economic operators.

(7) Where a utility considers that the qualification system of certain other entities or other bodies meets its requirements, it must communicate the names of those entities and bodies to interested economic operators.

(8) A utility must keep a written record of qualified economic operators, which may be divided into categories according to type of contract for which the qualification is valid.

(9) When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts for the works, supplies or services covered by the qualification system must be awarded by restricted or negotiated procedure, competitive dialogue or innovation partnership as modified so that all tenderers and participants are selected among the candidates already qualified in accordance with such a system without being required to submit further information for qualitative selection or to submit a request to participate.

(10) Any charges that are billed to an economic operator by a utility in connection with requests for qualification or with updating or conserving an already obtained qualification in accordance with the system must be proportionate to the generated costs.

## **Criteria for qualitative selection**

**76.**—(1) A utility—

- (a) may establish objective rules and criteria for the exclusion and selection of tenderers or candidates; and
- (b) if so, must make those rules and criteria available to interested economic operators.

(2) Subject to paragraph (3), where a utility needs to ensure an appropriate balance between the particular characteristics of the procurement and the resources required to conduct it, it may, in restricted procedures, negotiated procedures, competitive dialogues or innovation partnerships, establish objective rules and criteria that reflect that need and enable the utility to reduce the number of candidates that will be invited to tender or to negotiate.

(3) A utility must take account of the need to ensure adequate competition when selecting the number of candidates.

## **Reliance on the capacities of other entities**

**77.**—(1) This regulation applies where there are objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; or
- (b) candidates and tenderers in open, restricted or negotiated procedures, competitive dialogues or innovation partnerships.

(2) Where the objective rules and criteria for the exclusion and selection of those referred to in paragraph (1) include requirements relating to the economic operator's economic and financial capacity or technical and professional abilities, an economic operator may, where necessary rely upon the capacities of other entities, regardless of the legal nature of the links which it has with them.

(3) With regard to criteria relating to the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff or to relevant professional experience, economic operators may only rely upon the capacities of other entities where the latter will perform the works or services for which these capacities are required.

(4) Where an economic operator wants to rely upon the capacities of other entities, it must prove to the utility that the necessary resources will be available to it, for example by producing a commitment by those entities to that effect.

(5) For the purposes of paragraph (4), an economic operator requesting qualification in a qualification system must prove that the necessary resources will be available to it throughout the period of the qualification system.

(6) Where, in accordance with regulation 78 (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), a utility has referred to exclusion or selection criteria provided for under the Public Contracts (Scotland) Regulations, the utility must verify, in accordance with the provisions applied by regulation 78(4)—

- (a) whether the other entities upon whose capacity the economic operator intends to rely fulfil the relevant selection criteria; or
- (b) whether there are grounds for exclusion, to which the utility has referred, under regulation 58 of the Public Contracts (Scotland) Regulations.

(7) The utility—

- (a) must require the economic operator to replace an entity which does not meet a relevant selection criterion or in respect of which there are compulsory grounds for exclusion; and
- (b) may require the economic operator to substitute an entity in respect of which there are non-compulsory grounds for exclusion.

(8) Where an economic operator relies upon the capacities of other entities with regard to criteria relating to economic and financial standing, the utility may require the economic operator and those entities to be jointly liable for the performance of the contract.

(9) A group of economic operators as referred to in regulation 35(4) (economic operators) may rely upon the capacities of participants in the group or of other entities, and paragraphs (1) to (8) apply in relation to such a group in the same way that they apply in relation to an economic operator.

(10) In the case of works contracts, supply contracts requiring siting or installation work and services contracts, a utility may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in regulation 35(4) (economic operators), by a participant in that group.

### **Use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations**

**78.**—(1) This regulation applies to objective rules and criteria for the exclusion and selection of—

- (a) economic operators requesting qualification in a qualification system; and
- (b) candidates and tenderers in open, restricted or negotiated procedures, competitive dialogues or innovation partnerships.

(2) The objective rules and criteria may include—

- (a) the exclusion grounds referred to in regulation 58 of the Public Contracts (Scotland) Regulations on the terms set out in that regulation;
- (b) the selection criteria listed in regulation 59 of the Public Contracts (Scotland) Regulations on the terms set out in that regulation, including as regards the limits to requirements concerning yearly turnovers as provided for under regulation 59(9) and (10) of those Regulations.

(3) Where the utility is a contracting authority, the criteria and rules referred to in paragraph (1) must include the exclusion grounds listed in regulation 58(1) to (3) of the Public Contracts (Scotland) Regulations on the terms set out in that regulation.

(4) For the purposes of applying paragraphs (1) to (3), regulations 60 to 62 of the Public Contracts (Scotland) Regulations apply.

(5) For the purposes of paragraphs (2) and (4), any reference to a contracting authority in regulations 58 to 62 of the Public Contracts (Scotland) Regulations must be read as a reference to a utility.

### **Quality assurance standards and environmental management standards**

**79.**—(1) A utility must, where it requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, including on accessibility for disabled persons, refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.

(2) A utility must recognise equivalent certificates from bodies established in other member States.

(3) A utility must also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

(4) Where a utility requires the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management systems or standards, the utility must refer to the Eco-Management and Audit Scheme of the EU—

- (a) referred to in Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC(a);
- (b) other environmental management systems as recognised in accordance with Article 45 of that Regulation; or
- (c) other environmental management standards based on the relevant European or international standards by accredited bodies,

and must recognise equivalent certificates from bodies established in other member States.

(5) Where an economic operator had demonstrably no access to such certificates referred to in paragraph (4) or no possibility of obtaining them within the relevant time limits for reasons that are not attributable to that economic operator, the utility must accept other evidence of environmental management measures, provided that the economic operator proves that these measures are equivalent to those required under the applicable environmental management system or standard.

## SUB-SECTION 2 *Award of the Contract*

### **Contract award criteria**

**80.**—(1) A utility must base the award of contracts on the most economically advantageous tender assessed from the point of view of the utility.

(2) Where the utility is a person mentioned in regulation 4(1)(a) (utilities) it must not use price only or cost only as the sole award criteria.

(3) A utility must identify the most economically advantageous tender on the basis of the price or cost using a cost-effectiveness approach (such as life-cycle costing in accordance with regulation 81 (life-cycle costing)) and may include the best price-quality ratio which must be assessed on the basis of criteria linked to the subject-matter of the contract in question.

(4) Criteria referred to in paragraph (3) may comprise or include—

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; and
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion and commitments with regard to parts and security of supply.

(5) The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

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(a) OJ L 342, 22.12.2009, p.1, amended by Council Regulation (EU) No 517/2013 (OJ L 158, 10.6.2013, p.1).

(6) Award criteria must be considered to be linked to the subject-matter of the contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

(7) Award criteria must—

- (a) not have the effect of conferring an unrestricted freedom of choice upon the utility;
- (b) ensure the possibility of effective competition; and
- (c) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

(8) In case of doubt, the utility must verify effectively the accuracy of the information and proof provided by the tenderers.

(9) The utility must specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

(10) The weightings referred to in paragraph (9) may be expressed by providing for a range with an appropriate maximum spread.

(11) Where weighting is not possible for objective reasons, the utility must indicate the criteria in descending order of importance.

### **Life-cycle costing**

**81.—**(1) Life-cycle costing must, to the extent relevant, cover part or all of the following costs over the life cycle of a product, service or works—

- (a) costs, borne by the utility or other users, such as—
  - (i) costs relating to acquisition;
  - (ii) costs of use, such as consumption of energy and other resources;
  - (iii) maintenance costs;
  - (iv) end of life costs, such as collection and recycling costs; and
- (b) costs imputed to environmental externalities linked to the works, product or service during its life cycle, provided their monetary value can be determined and verified.

(2) The costs mentioned in paragraph (1)(b) may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

(3) The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions—

- (a) it is based on objectively verifiable and non-discriminatory criteria and, in particular, where it has not been established for repeated or continuous application, it must not unduly favour or disadvantage certain economic operators;
- (b) it is accessible to all interested parties;
- (c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the EU is bound.

(4) Where a utility assesses costs using a life-cycle costing approach, the utility must indicate in the procurement documents—

- (a) the data to be provided by the tenderers; and
- (b) the method which the utility will use to determine the life-cycle costs on the basis of those data.

(5) Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the EU, that common method must be applied for the assessment of life-cycle costs.

(6) Legislative acts referred to in paragraph (5) include those set out in Annex XV to the Utilities Contracts Directive as amended from time to time.

### **Abnormally low tenders**

**82.**—(1) A utility must require a tenderer to explain the price or costs proposed in the tender where the tender appears to be abnormally low in relation to the works, supplies or services.

(2) The explanations given in accordance with paragraph (1) may, in particular, relate to—

- (a) the economics of the manufacturing process, of the services provided or of the construction method;
- (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the works or for the supply of the products or services;
- (c) the originality of the works, supplies or services proposed by the tenderer;
- (d) compliance with obligations referred to in regulation 34(4) (principles of procurement);
- (e) compliance with obligations referred to in regulation 85 (subcontracting);
- (f) the possibility of the tenderer obtaining State aid.

(3) The utility must assess the information provided by consulting the tenderer.

(4) The utility may only reject the tender where the explanations given and any evidence supplied do not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).

(5) The utility must reject the tender where the utility has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 34(4) (principles of procurement).

(6) Where the utility establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only—

- (a) after consultation with the tenderer; and
- (b) where the tenderer is unable to prove, within a sufficient time limit fixed by the utility, that the aid in question was compatible with the internal market within the meaning of Article 107 of the TFEU.

(7) Where the utility rejects a tender in the circumstances referred to in paragraph (6), it must inform the Commission.

## SECTION 4

### *Tenders comprising products originating in third countries and relations with those countries*

#### **Tenders comprising products originating in third countries**

**83.**—(1) This regulation applies to tenders covering products originating in third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

(2) For the purposes of this regulation—

- (a) the origin of products must be determined in accordance with Council Regulation (EEC) No 2913/92 establishing the Community Customs Code<sup>(a)</sup> as amended from time to time;

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(a) OJ L 302, 19.10.1992, p.1; Regulation as last amended by Council Regulation (EU) No 517/2013 of 13th May 2013 (OJ L 158, 10.6.2013, p.1.

- (b) software used in telecommunications network equipment must be regarded as products; and
- (c) those third countries to which the benefits of the Utilities Contracts Directive has been extended by an EU Council Decision, must not be taken into account by a utility for determining the proportion, referred to in paragraph (3), of products originating in third countries.

(3) A utility may reject any tender submitted for the award of a supply contract where the proportion of the products originating in third countries is greater than 50% of the total estimated value of the products constituting the tender.

(4) Subject to paragraph (5), where two or more tenders are equivalent in the light of the contract award criteria defined in accordance with regulation 80 (contract award criteria) the utility must give preference to those tenders which may not be rejected in accordance with paragraph (3).

(5) Paragraph (4) does not apply where acceptance of such tender would oblige the utility to acquire equipment having technical characteristics different from those of existing equipment, resulting in—

- (a) incompatibility;
- (b) technical difficulties in operation and maintenance; or
- (c) disproportionate costs.

(6) For the purposes of paragraph (4), tenders must be considered equivalent if the price difference between those tenders does not exceed 3%.

## CHAPTER 4

### CONTRACT PERFORMANCE

#### **Conditions for performance of contracts**

**84.**—(1) A utility may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract within the meaning of regulation 80(6) (contract award criteria); and
- (b) indicated in the call for competition or in the procurement documents.

(2) Such conditions may include economic, innovation-related, environmental, social or employment-related considerations.

#### **Subcontracting**

**85.**—(1) In the procurement documents, the utility may ask the tenderer to indicate in its tender any share of the contract that the tenderer may intend to subcontract to third parties and information about any proposed subcontractors including their name and contact details.

(2) Paragraph (1) is without prejudice to the liability of the main contractor under the contract.

(3) Where paragraph (4) applies, the utility must require the main contractor to notify it at the latest when the performance of the contract commences, of the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

(4) This paragraph applies in the case of—

- (a) a works contract;
- (b) a services contract which includes services to be provided at a facility under the direct oversight of the utility.

- (5) The utility must require the main contractor to notify the utility of—
- (a) any changes to the information referred to in paragraph (3) during the course of the contract; and
  - (b) the name, contact details and legal representatives of any new subcontractors which the contractor subsequently involves in such works or services.
- (6) Paragraphs (3) and (5) do not apply to subcontractors who provide only supplies.
- (7) Where necessary for the purposes of paragraph (9), the required information must be accompanied by ESPDs in respect of the subcontractors.
- (8) A utility may require a contractor to provide information of the kind referred to in paragraphs (3) and (5) in respect of any one or more of the following—
- (a) supply contracts or services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the utility);
  - (b) suppliers involved in works or services contracts;
  - (c) subcontractors of the main contractor's subcontractors or other contractors further down the subcontracting chain.
- (9) A utility may, in accordance with regulation 78(4) (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations), verify whether there are grounds for exclusion of subcontractors pursuant to regulation 58 of the Public Contracts (Scotland) Regulations.
- (10) The utility must require the economic operator to replace a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion.
- (11) The utility may require the economic operator to replace a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

#### **Modification of contracts during their term**

- 86.**—(1) A contract and framework agreement may be modified without a new procurement—
- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
    - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used; and
    - (ii) do not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
  - (b) to provide for additional works, supplies or services by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement, where a change of contractor—
    - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
    - (ii) would cause significant inconvenience or substantial duplication of costs for the utility;
  - (c) where the need for modification has been brought about by circumstances which a diligent utility could not have foreseen and the modification does not alter the overall nature of the contract or framework agreement;
  - (d) where a new contractor replaces one to which the utility had initially awarded the contract or framework as a consequence of—
    - (i) an unequivocal review clause or option in conformity with sub-paragraph (a); or
    - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by

another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract or framework agreement and is not aimed at circumventing the application of this Part;

- (e) where the modifications, irrespective of their value, are not substantial (as defined in paragraph (7)); or
- (f) where paragraph (4) applies.

(2) A utility which has modified a contract or framework agreement in either of the cases described in paragraph (1)(b) or (c) must send a notice to that effect for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

(3) The notice referred to in paragraph (2) must contain the information set out in Annex XVI to the Utilities Contracts Directive.

(4) This paragraph applies where the value of the modification is below both of the following values—

- (a) the relevant threshold mentioned in regulation 15 (thresholds); and
- (b) 10% of the initial contract value for service and supply contracts or framework agreements and 15% of the initial contract value for works contracts or framework agreements,

provided that the modification does not alter the overall nature of the contract or framework agreement.

(5) For the purposes of paragraph (4), where several successive modifications are made, the value must be the net cumulative value of the successive modifications.

(6) For the purpose of the calculation of the values mentioned in paragraph (4)(b) the updated figure shall be the reference figure when the contract or framework agreement includes an indexation clause.

(7) A modification of a contract or a framework agreement during its term must be considered substantial for the purpose of paragraph (1)(e) where one or more of the following conditions are met—

- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial procurement, would have—
  - (i) allowed for the admission of candidates other than those initially selected;
  - (ii) allowed for the acceptance of a tender other than that originally accepted; or
  - (iii) attracted additional participants in the procurement;
- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (d) the modification extends the scope of the contract or framework agreement considerably;
- (e) a new contractor replaces one to which the utility had initially awarded the contract or framework agreement in cases other than those provided for in paragraph (1)(d).

(8) A new procurement in accordance with these Regulations is required for modifications of the provisions of a works, supply or service contract or a framework agreement during its term other than those provided for in this regulation.

## **Termination of contracts**

**87.**—(1) A utility must ensure that every works, supply or service contract or framework which the utility awards contains provisions enabling the utility to terminate the contract or framework where—

- (a) the contract or framework has been subject to a substantial modification which would have required a new procurement in accordance with regulation 86(8) (modification of contracts during their term);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 58(1) of the Public Contracts (Scotland) Regulations, including as a result of the application of regulation 58(2) of those Regulations, and should have been excluded from the procurement as a result of the application of rules and criteria referred to in regulation 78(3) (use of exclusion grounds and selection criteria provided for under the Public Contracts (Scotland) Regulations) of these Regulations; or
- (c) the contract or framework should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Utilities Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of the TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a contract or framework does not contain provisions enabling the utility to terminate the contract or framework on any of the grounds mentioned in paragraph (1), a power for the utility to do so on giving notice to the contractor shall be an implied term of that contract or framework.

## **PART 3**

### **PARTICULAR PROCUREMENT REGIMES**

#### **CHAPTER 1**

#### **SOCIAL AND OTHER SPECIFIC SERVICES**

### **Award of contracts for social and other specific services**

**88.** A contract or framework for social and other specific services listed in Schedule 2 (social and other specific services) must be awarded in accordance with this Chapter, where the estimated value of the contract or framework is equal to or greater than the threshold indicated in regulation 15(1)(c) (thresholds).

### **Publication of notices**

**89.**—(1) A utility intending to award a contract or framework for the services referred to in regulation 88 (award of contracts for social and other specific services) must make known its intention by means of—

- (a) a contract notice;
- (b) a periodic indicative notice, which must—
  - (i) be published continuously;
  - (ii) refer specifically to the types of services that will be the subject of the contract or framework to be awarded; and
  - (iii) indicate that the contract or framework will be awarded without further publication and invite interested economic operators to express their interest in writing; or

(c) a notice on the existence of a qualification system, which must be published continuously.

(2) Paragraph (1) shall not apply where a negotiated procedure without prior call for competition could have been used in accordance with regulation 48 (use of the negotiated procedure without prior call for competition) for the award of the contract or framework.

(3) A utility that has awarded a contract or framework for the services referred to in regulation 88 (award of contracts for social and other specific services) must make known the results of the procurement by means of a contract award notice.

(4) A utility may, however, group notices referred to in paragraph (3) on a quarterly basis, in which case it must send the grouped notices within 30 days of the end of each quarter.

(5) The notices referred to in paragraphs (1), (3) and (4) must contain the information referred to in the relevant part of Annex XVIII to the Utilities Contracts Directive.

(6) A utility must send the notices referred to in paragraphs (1), (3) and (4) for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

### **Principles of awarding contracts**

**90.**—(1) A utility must determine the procedure that is to be applied in connection with the award of a contract or framework subject to this Chapter and may take into account—

- (a) the specificities of the services in question; and
- (b) the requirements and needs of users.

(2) The procedure must be at least sufficient to ensure compliance with the principles of transparency and equal treatment of economic operators.

(3) The procedure may provide for the exclusion from participation in the procurement of any economic operator in relation to which exclusion grounds referred to in regulation 58 of the Public Contracts (Scotland) Regulations apply on the terms set out in that regulation.

(4) Where the utility is a contracting authority, the procedure must provide for the exclusion from participation in the procurement of any economic operator in relation to which exclusion grounds referred to in regulation 58(1) to (3) of the Public Contracts (Scotland) Regulations apply on the terms set out in that regulation.

(5) Where, in accordance with regulation 89 (publication of notices), a contract notice or periodic indicative notice has been published in relation to a procurement, the utility must, except in the circumstances mentioned in paragraph (6), conduct that procurement, and award any resulting contract or framework, in conformity with the information contained in the notice about—

- (a) conditions for participation;
- (b) time limits for contacting the utility; and
- (c) the award procedure to be applied.

(6) The utility may, however, conduct the procurement, and award any resulting contract or framework, in a way which is not in conformity with that information, but only if all of the following conditions are met—

- (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators;
- (b) the utility has—
  - (i) after giving due consideration to the matter, concluded that sub-paragraph (a) is applicable;
  - (ii) documented that conclusion and the reasons for it in accordance with regulation 96(5) and (6) (reporting and documentation requirements); and
  - (iii) informed the participants of the respects in which the utility intends to proceed in a way which is not in accordance with the information contained in the notice.

(7) In paragraph (6)(b)(iii), “participants” means any economic operators which have responded to the notice and not been informed by the utility that they are no longer under consideration for the award of a contract within the scope of the procurement concerned.

(8) All time limits imposed upon economic operators for the purposes of this regulation, whether for responding to a contract notice or taking any other steps in the relevant procedure, must be reasonable and proportionate having regard to the nature of the requirement and the needs of service users.

(9) Without prejudice to the generality of paragraph (1), a utility may apply procedures for the purposes of this regulation which correspond (with or without variations) to procedures, techniques or other features otherwise provided for in these Regulations, as well as procedures which do not.

(10) In relation to the award of contracts subject to this regulation, a utility may take into account—

- (a) the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services;
- (b) the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- (c) the involvement and empowerment of users;
- (d) innovation; and
- (e) any other relevant consideration.

(11) A utility which is a person mentioned in regulation 4(1)(a) (utilities) must award a contract or framework for services listed in Schedule 2 (social and other specific services) on the basis of the tender representing the best price-quality ratio, taking into account quality and sustainability criteria for such services.

## CHAPTER 2

### RULES GOVERNING DESIGN CONTESTS

#### Scope of Chapter

**91.** This Chapter applies to—

- (a) design contests organised as part of a procedure leading to the award of a service contract provided that the estimated value net of VAT of the service contract including any possible prizes or payments to participants is equal to or greater than the threshold referred to in regulation 15(1)(a) (thresholds); and
- (b) design contests where the total estimated value net of VAT of contest prizes and payments to participants, including the estimated value net of VAT of the service contract which might subsequently be concluded in accordance with regulation 48(4)(f) (use of the negotiated procedure without prior call for competition) if the utility does not exclude such an award in the contest notice, is equal to or greater than the threshold referred to in regulation 15(1)(a) (thresholds).

#### Notices

**92.—(1)** A utility that intends to carry out a design contest must call for competition by means of a contest notice which includes the information set out in Annex XIX to the Utilities Contracts Directive.

(2) Where a utility intends to award a subsequent service contract under regulation 48(4)(f) (use of the negotiated procedure without prior call for competition) this must be indicated in the contest notice.

- (3) A utility that has held a design contest must—
- (a) make the results known by means of a notice which must include the information set out in Annex XX to the Utilities Contracts Directive; and
  - (b) send such notice to the EU Publications Office within 30 days of the closure of the design contest.
- (4) A utility may withhold from publication information on the result of the contest where the release of the information—
- (a) would impede law enforcement or otherwise be contrary to the public interest;
  - (b) would prejudice the commercial interests of any person; or
  - (c) might prejudice fair competition between economic operators.
- (5) The utility must send the notices referred to in this regulation for publication in accordance with regulation 69 (form and manner of sending notices for publication at EU level).

### **Rules on the organisation of design contests and the selection of participants and the jury**

**93.**—(1) When organising a design contest, a utility must apply procedures which are adapted to the provisions of Part 1 and this Chapter.

(2) The utility must not limit admission of participants to a design contest by reference to the territory or part of the territory of a member State.

(3) Where a design contest is restricted to a limited number of participants, the utility must—

- (a) lay down clear and non-discriminatory selection criteria; and
- (b) ensure that the number of candidates invited to participate is sufficient to ensure genuine competition in so far as there are enough qualified candidates.

(4) A utility must appoint a jury which must be composed exclusively of natural persons who are independent participants in the contest.

(5) Where a particular professional qualification is required of participants in a contest at least a third of the jury members must have that qualification or an equivalent qualification.

### **Decisions of the jury**

**94.**—(1) The jury must be autonomous in its decisions and opinions.

(2) The jury must examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

(3) The jury must record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points that may need clarification.

(4) Anonymity must be observed until the jury has reached its opinion or decision.

(5) Candidates may be invited, if need be, to answer questions that the jury has recorded in the minutes to clarify any aspects of the projects.

(6) Complete minutes must be drawn up of the dialogue between jury members and candidates.

## **PART 4**

### **INFORMATION AND DOCUMENTATION**

#### **Retention of contract copies**

**95.**—(1) A utility must, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than—

- (a) 1,000,000 Euros in the case of supply or service contracts;

(b) 10,000,000 Euros in the case of works contracts.

(2) A utility must grant access to those contracts, but access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable EU or national rules on access to documents and data protection.

### **Reporting and documentation requirements**

**96.**—(1) Subject to paragraph (2), a utility must keep appropriate information on each contract and framework agreement covered by these Regulations and each time a dynamic purchasing system is established.

(2) The information referred to in paragraph (1) must be sufficient to permit the utility at a later date to justify decisions taken in connection with—

- (a) the qualification and selection of economic operators and the award of contracts;
- (b) the use of negotiated procedures without a call for competition in accordance with regulation 48 (use of the negotiated procedure without prior call for competition);
- (c) the derogations provided for in Chapters 2 and 3 of Part 1 to these Regulations relating to Chapters 2 to 4 of Part 2 to these Regulations;
- (d) where necessary, the reasons why means of communication other than electronic means have been used for the submission of tenders.

(3) To the extent that the contract award notice drawn up in accordance with regulations 68 (contract award notices) or 89(3) (publication of notices) contains the information required in this paragraph, the utility may refer to that notice.

(4) A utility must document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means.

(5) For the purposes of paragraph (4), a utility must ensure that the utility keeps sufficient documentation to justify decisions taken in all stages of the procurement, such as documentation on—

- (a) communications with economic operators;
- (b) internal deliberations;
- (c) preparation of the procurement documents;
- (d) dialogue or negotiation, if any;
- (e) selection and award of the contract.

(6) The documentation must be kept for a period of at least 3 years from the date of award of the contract.

(7) Where the Commission so requests, the utility must communicate the information and documentation referred to in paragraphs (1) to (5), or its main elements, to the Commission.

(8) Where the Scottish Ministers so request, the utility must communicate the information and documentation referred to in paragraphs (1) to (5), or its main elements, to the Scottish Ministers or to such other body as the Scottish Ministers may direct in connection with any functions which that body exercises for the purpose of Article 99 of the Utilities Contracts Directive.

(9) A utility must, for the purpose of enabling the Scottish Ministers to provide the Commission with other information or documentation, send to the Scottish Ministers such other information or documentation as the Scottish Ministers may from time to time request in respect of a procurement—

- (a) within the scope of these Regulations; or
- (b) which would have been within the scope of these Regulations if their value had exceeded the relevant threshold mentioned in regulation 15 (thresholds).

**PART 5**  
**REMEDIES**  
**CHAPTER 1**  
**FACILITATION OF REMEDIES**

**Scope of Chapter**

97. This Chapter applies to procurement falling within the scope of Parts 1 to 4.

**Notices of decisions to award a contract or conclude a framework agreement**

98.—(1) Subject to paragraphs (4) and (5), a utility must, by notice in writing as soon as possible after the decision has been made, inform all tenderers and candidates concerned of its decision to award the contract, conclude the framework agreement or establish a dynamic purchasing system.

(2) The notice referred to in paragraph (1) must include—

- (a) the criteria for the award of the contract, conclusion of the framework agreement or establishment of the dynamic purchasing system;
- (b) where practicable, the score obtained by the economic operator which is to receive the notice;
- (c) the name of and, where practicable, the score obtained by the economic operator—
  - (i) to be awarded the contract;
  - (ii) to become a party to the framework agreement; or
  - (iii) to be admitted to the dynamic purchasing system;
- (d) in the case of an unsuccessful tenderer—
  - (i) a summary of the reasons why the tenderer was unsuccessful; and
  - (ii) the characteristics and relative advantages of the successful tender;
- (e) in the case of an unsuccessful candidate concerned, a summary of the reasons why the candidate was unsuccessful; and
- (f) a precise statement of the effect of regulation 99 (standstill period) on the economic operator which is to receive the notice.

(3) The reasons referred to in paragraph (2)(d)(i) and (e) must include any reason for the utility's decision that the economic operator did not meet the technical specifications—

- (a) because compliance with a specification mentioned in regulation 58(13) (technical specifications) does not address the performance or functional requirements laid down by the utility; or
- (b) in an equivalent manner as mentioned in regulation 58(14) (technical specifications).

(4) Paragraph (1) does not apply where—

- (a) the only tenderer is the economic operator to be awarded the contract or to become a party to the framework agreement, and there are no candidates concerned;
- (b) the contract is a contract awarded under a framework agreement or a dynamic purchasing system; or
- (c) the contract or framework agreement is exempt from the requirement for prior publication of a call for competition.

(5) A utility may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—

- (a) would impede law enforcement or would otherwise be contrary to the public interest;

- (b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or
  - (c) might prejudice fair competition between economic operators.
- (6) Subject to paragraph (5), a utility must within 15 days of the date on which it receives a request in writing from any economic operator—
- (a) if it was unsuccessful, inform that economic operator of the reasons why it was unsuccessful, including any reason referred to in paragraph (3);
  - (b) in the case of an unsuccessful tenderer, other than a tenderer which has been informed by notice under paragraph (1), inform that tenderer of the characteristics and relative advantages of the successful tender and the name of—
    - (i) the economic operator to be awarded the contract;
    - (ii) the parties to the framework agreement; or
    - (iii) the economic operators admitted to the dynamic purchasing system; and
  - (c) if it was successful, a description of any improvements the utility considers the tenderer could have made to its tender.
- (7) Subject to paragraph (5), a utility must by notice in writing, as soon as possible after the decision has been made, inform all candidates and tenderers of its decision to abandon or recommence a contract award procedure in respect of which a call for competition has been published in relation to—
- (a) the award of a contract;
  - (b) the conclusion of a framework agreement; or
  - (c) the establishment of a dynamic purchasing system.
- (8) Where a utility provides information in accordance with paragraph (7) it must include the reasons for its decision and, if so requested by an economic operator, must provide the information and reasons in writing.
- (9) In this regulation—
- “candidate” means a candidate, as defined in regulation 2(1) (interpretation), which—
- (a) is not a tenderer; and
  - (b) has not been informed of the rejection of its application and the reasons for it; and
- “tenderer” means a tenderer, as defined in regulation 2(1) (interpretation), which has not been definitively excluded.
- (10) For the purposes of paragraph (9), an exclusion is definitive only if the tenderer has been notified of the exclusion and either—
- (a) the exclusion has been held to be lawful in proceedings under Chapter 2 of this Part (applications to the court); or
  - (b) the time limit for starting such proceedings has expired even on the assumption that the court would have granted the maximum extension permitted by regulation 101(4) (enforcement of duties through the courts).

### **Standstill period**

**99.**—(1) A utility must allow a period of at least the relevant standstill period to elapse between the date of despatch of the notice referred to in regulation 98(1) (notices of decisions to award a contract or conclude a framework agreement) and the date on which that utility enters into the contract or concludes the framework agreement.

- (2) Paragraph (1) does not apply where—
- (a) the contract or framework agreement is exempt from the requirement for prior publication of a call for competition;
  - (b) there are no tenderers concerned or candidates concerned; or

(c) a notice is not required to be given under regulation 98(1) (notices of decisions to award a contract or conclude a framework agreement).

(3) Where notice is sent to all economic operators by facsimile or electronic means, the standstill period is a period of 10 days ending at midnight at the end of the 10<sup>th</sup> day after that on which the last notice is sent.

(4) Where the notice is sent to any economic operators only by other means, the standstill period is a period of 15 days ending at midnight at the end of the 15<sup>th</sup> day after that on which the last notice is sent.

## CHAPTER 2

### APPLICATIONS TO THE COURT

#### **Duty owed to economic operators**

**100.**—(1) The obligation on a utility to comply with the provisions of these Regulations (except where otherwise specified), and with any enforceable EU obligation in respect of a contract, framework agreement, dynamic purchasing system or design contest falling within the scope of these Regulations, is a duty owed to an economic operator from an EEA state.

(2) The duty owed in accordance with paragraph (1) is a duty owed also to—

- (a) an economic operator from a GPA state, but only where the GPA applies to the procurement concerned; and
- (b) an economic operator which is not from an EEA state or a GPA state, but only if a relevant bilateral agreement applies.

(3) For the purposes of paragraph (2)(a), the GPA applies to a procurement if—

- (a) the procurement may result in the award of a contract of any description; and
- (b) at the relevant time—
  - (i) a GPA state has agreed with the EU that the GPA shall apply to a contract of that description; and
  - (ii) the economic operator is from that GPA state.

(4) For the purposes of paragraph (2)(b), a relevant bilateral agreement applies if—

- (a) there is an international agreement, other than the GPA, by which the EU is bound; and
- (b) in accordance with that agreement, the economic operator is, in respect of the procurement concerned, to be accorded remedies no less favourable than those accorded to economic operators from the EU in respect of matters falling within the scope of the duty owed in accordance with paragraph (1).

(5) In this regulation—

except in paragraph (1), references to an “economic operator”, include a reference to a GPA economic operator;

“GPA economic operator” means a person from a GPA state who sought, who seeks, or would have wished, to be the person to whom the contract is awarded;

“GPA state” means any country, other than an EEA state, which at the relevant time is a signatory to the GPA;

“relevant time” means the date on which the utility sent a call for competition in respect of the contract to the EU Publications Office or would have done so had it been required by these Regulations to do so.

## **Enforcement of duties through the courts**

**101.**—(1) A breach of the duty owed in accordance with regulation 100 (duty owed to economic operators) is actionable by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage.

(2) Any proceedings for the purposes of paragraph (1) must be brought in the Sheriff Court or the Court of Session.

(3) Proceedings under this regulation may not be brought unless—

(a) the economic operator bringing the proceedings has informed the utility of—

(i) the breach or apprehended breach of the duty owed to it in accordance with regulation 100 (duty owed to economic operators); and

(ii) of its intention to bring proceedings under this Part in respect of that breach or apprehended breach; and

(b) the proceedings are brought in accordance with paragraph (4).

(4) For the purpose of paragraph (3)(b), proceedings must be brought—

(a) in the case of proceedings seeking an ineffectiveness order (as defined in regulation 104 (ineffectiveness orders))—

(i) where paragraph (5) applies, within 30 days from the relevant date referred to in that paragraph; and

(ii) in any other case, within 6 months from the date of the contract being entered into or the date of conclusion of the framework agreement; and

(b) in any other case, within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen unless the court considers that there is a good reason for extending the period within which proceedings may be brought, in which case the court may extend that period up to a maximum of 3 months from that date.

(5) For the purpose of paragraph (4)(a)(i), this paragraph applies where—

(a) the utility has sent a contract award notice to the Official Journal in accordance with regulation 69 (form and manner of sending notices for publication at EU level), including reasons for its decision to enter into the contract or conclude the framework agreement without prior publication of a call for competition, in which case the relevant date is the date of publication of the notice in the Official Journal; or

(b) the utility has by notice in writing informed all tenderers concerned and all candidates concerned (if any) of its decision in relation to the award of the contract or the conclusion of the framework agreement, and the notice includes the information referred to in regulation 98(2)(d)(i) or, as the case may be, (e) (notices of decisions to award a contract or conclude a framework agreement), in which case the relevant date is the date of sending of the notice.

## **Automatic Suspension of utility's power to proceed with contract award**

**102.** Without prejudice to the application of any relevant standstill period, where proceedings under this Part are served on a utility in relation to a contract that has not been entered into, a framework agreement that has not been concluded or a dynamic purchasing system that has not been established, the utility must not enter into the contract, conclude the framework agreement or establish the dynamic purchasing system unless—

(a) the proceedings are determined, discontinued or disposed of; or

(b) the court, by interim order, brings to an end the prohibition.

## **Powers and duties of the court**

**103.**—(1) Subject to paragraphs (3) and (7), but otherwise without prejudice to any other powers of the court, in proceedings brought under this Part the court—

- (a) may by interim order suspend one or more of the following—
  - (i) the procedure leading to the award of a contract, the conclusion of a framework agreement, the establishment of a dynamic purchasing system or the determination of a design contest;
  - (ii) the implementation of any decision or action taken by the utility in the course of following a procedure referred to in paragraph (i);
- (b) if satisfied that a decision or action taken by a utility was in breach of the duty owed under regulation 100 (duty owed to economic operators), may do one or more of the following—
  - (i) order the setting aside of that decision or action;
  - (ii) order the utility to amend any document;
  - (iii) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

(2) In any interim proceedings under this Part the court may decide not to grant an interim order when the negative consequences of such an order are likely to outweigh the benefits, having regard to the following considerations—

- (a) that decisions taken by a utility must be reviewed effectively and, in particular, as rapidly as possible;
- (b) the probable consequences of an interim order for all interests likely to be harmed; and
- (c) the public interest.

(3) Where the court is satisfied that regulation 104(8)(a) (ineffectiveness orders) applies but the second ground for ineffectiveness (within the meaning of regulation 104(8)) is not otherwise met, the court must, without prejudice to the other powers of the court, order—

- (a) the payment by the utility of a financial penalty; or
- (b) the shortening of the duration of the contract or framework agreement awarded following the procurement in relation to which the breach occurred.

(4) In determining what order to make under paragraph (3) the court must—

- (a) ensure that the order is effective, proportionate and dissuasive; and
- (b) have regard to all relevant factors including—
  - (i) the seriousness of the breach; and
  - (ii) the behaviour of the utility.

(5) Where the court makes an order under paragraph (3)(b) the court must, without prejudice to the other powers of the court, make such other order as the court considers appropriate to address the consequences of the shortening of the duration of the contract or framework agreement on the rights and obligations of the parties to the contract or framework agreement.

(6) Before making an order under paragraph (5), the court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should the duration of the contract or framework agreement be shortened.

(7) Subject to paragraph (3) and regulation 104 (ineffectiveness orders), in proceedings under this Part the court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed under regulation 100 (duty owed to economic operators) if the contract in relation to which the breach occurred has been entered into, or the framework agreement in relation to which the breach occurred has been concluded.

(8) Sections 21 and 42 of the Crown Proceedings Act 1947<sup>(a)</sup> do not apply in proceedings brought under this Part against the Crown.

### **Ineffectiveness orders**

**104.**—(1) Without prejudice to all rights and obligations in respect of the period leading up to the date of the order, an ineffectiveness order made in relation to a contract renders unenforceable all rights and obligations directly arising from the contract in respect of the period commencing on the date of the order.

(2) Subject to any order made under regulation 105(1)(b) (powers of the court) obligations rendered unenforceable by an ineffectiveness order made in relation to a contract must not be performed by the parties to the contract.

(3) Without prejudice to any power of the court to make an ineffectiveness order in relation to a contract based on a framework agreement in accordance with this Part, an ineffectiveness order made in relation to a framework agreement prohibits, with effect from the date of the order, the awarding of contracts based on the framework agreement.

(4) Subject to paragraph (5) and regulation 106 (general interest grounds for not making a declaration of ineffectiveness), the court must make an ineffectiveness order where—

- (a) the first ground for ineffectiveness referred to in paragraph (6) applies;
- (b) the second ground for ineffectiveness referred to in paragraph (8) applies; or
- (c) the third ground for ineffectiveness referred to in paragraph (9) applies.

(5) In proceedings under this Part to which regulation 101(4)(b) (enforcement of duties through the courts) applies, the court does not have power to make an ineffectiveness order if the proceedings would be incompetent if regulation 101(4)(a) applied to the proceedings.

#### *First ground for ineffectiveness*

(6) The first ground for ineffectiveness applies where the utility has entered into a contract or has concluded a framework agreement without sending a call for competition to the Official Journal in circumstances where the contract or framework agreement was not exempt from the requirement for prior publication of a contract notice.

(7) The first ground for ineffectiveness does not apply where—

- (a) the utility sent to the Official Journal a notice in the form of the voluntary ex ante transparency notice in Annex XII to Commission Implementing Regulation (EU) No 2015/1986 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011<sup>(b)</sup> expressing its intention to enter into the contract or to conclude the framework agreement and containing—
  - (i) the name and contact details of the utility;
  - (ii) a description of the object of the contract or framework agreement;
  - (iii) a justification of the decision of the utility to award the contract or conclude the framework agreement without prior publication of a contract notice;
  - (iv) the name and contact details of the economic operator to be awarded the contract or to become party to the framework agreement; and
  - (v) any other information which the utility considered useful; and
- (b) the utility allowed a period of at least 10 days to elapse between the date of publication in the Official Journal of the notice referred to in sub-paragraph (a) and the date on which the utility entered into the contract or concluded the framework agreement.

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(a) 1947 c.44.

(b) OJ L 296, 12.11.2015 p.1.

*Second ground for ineffectiveness*

- (8) The second ground for ineffectiveness applies where all of the following apply—
- (a) the utility has breached regulation 98(1) (notices of decisions to award a contract or conclude a framework agreement), 99(1) (standstill period) or 102 (automatic suspension of utility’s power to proceed with contract award);
  - (b) the utility’s breach referred to in sub-paragraph (a) prevented the economic operator from bringing proceedings or obtaining a remedy before the contract was entered into or the framework agreement was concluded;
  - (c) in awarding the contract or concluding the framework agreement there has been a breach of the duty owed to the economic operator under these Regulations, other than a breach of regulations 98(1) (notices of decisions to award a contract or conclude a framework agreement), 99(1) (standstill period) or this Chapter;
  - (d) the utility’s breach referred to in sub-paragraph (c) has affected the chances of the economic operator bringing proceedings under this Part to obtain the contract or become a party to the framework agreement.

*Third ground for ineffectiveness*

- (9) The third ground for ineffectiveness applies where—
- (a) the contract is a contract based on a framework agreement or a contract awarded under a dynamic purchasing system;
  - (b) the contract was awarded in breach of—
    - (i) regulation 49(5) (framework agreements), in the case of a contract based on a framework agreement (rules governing the award of contracts based on a framework agreement); or
    - (ii) regulation 50(17) to (19), (21) or (22) (dynamic purchasing systems), in the case of a contract awarded under a dynamic purchasing system (rules governing the award of contracts under a dynamic purchasing system); and
  - (c) the estimated value of the contract at the relevant time is equal to or greater than the relevant threshold.
- (10) The third ground for ineffectiveness does not apply where the utility—
- (a) considered the award of the contract to be in accordance with the provisions mentioned in paragraph (9)(b);
  - (b) has, despite regulation 98(4)(b) (notices of decisions to award a contract or conclude a framework agreement), by notice in writing informed the economic operators that submitted tenders of its decision in relation to the award of the contract and the notice included the information referred to in regulation 98(1) to (3); and
  - (c) has allowed a period of at least the relevant standstill period to elapse between the date of sending of the notice of its decision to award the contract and the date on which the utility entered into the contract.

**Powers of the court: ineffectiveness order**

**105.**—(1) If an ineffectiveness order is made, the court must, without prejudice to the other powers of the court—

- (a) order the payment by the utility of a financial penalty; and
- (b) make such other order as the court considers appropriate to address the consequences of the ineffectiveness order on the rights and obligations of the parties to the contract or framework agreement.

(2) In the case of an order made under paragraph (1)(a), the court must have regard to the extent to which the contract or framework agreement will remain in effect in respect of the period leading up to the date of the ineffectiveness order.

(3) Before making an order under paragraph (1)(b), the court must have regard to any terms of the contract or framework agreement relating to the rights and obligations of the parties should an ineffectiveness order be made in relation to the contract or framework agreement.

### **General interest grounds for not making a declaration of ineffectiveness**

**106.**—(1) The court may decline to make an ineffectiveness order where the court is satisfied that overriding reasons relating to a general interest require that the enforceability of the rights and obligations arising from the contract or framework agreement should be maintained.

(2) For the purposes of paragraph (1)—

- (a) economic interests directly linked to the contract or framework agreement do not constitute overriding reasons relating to a general interest; and
- (b) economic interests in the effectiveness of the contract or framework agreement may only be considered as overriding reasons relating to a general interest in exceptional circumstances where ineffectiveness would lead to disproportionate consequences.

(3) For the purposes of paragraph (2)(a), economic interests directly linked to the contract or framework agreement include the costs—

- (a) resulting from the delay in the performance of the contract or framework agreement;
- (b) resulting from the commencement of a new procurement;
- (c) resulting from the change of the economic operator performing the contract or framework agreement; and
- (d) of legal obligations resulting from an ineffectiveness order.

### **Other orders**

**107.**—(1) Where the court declines to make an ineffectiveness order under regulation 106 (general interest grounds for not making a declaration of ineffectiveness), the court must, without prejudice to the other powers of the court, order—

- (a) the payment by the utility of a financial penalty; or
- (b) the shortening of the duration of the contract or framework agreement.

(2) In determining what order to make under paragraph (1)(a), regulation 103(4) (powers and duties of the court) applies.

(3) Regulation 103(5) and (6) (powers and duties of the court) applies to an order made under paragraph (1)(b) as it applies to an order made under regulation 103(3)(b).

### **Financial penalties**

**108.**—(1) Subject to paragraph (2), where a financial penalty is ordered to be paid under this Part—

- (a) the order must state that the financial penalty must be paid to the Scottish Ministers; and
- (b) the clerk of the court must send an extract of the decree (without charge) to the Scottish Ministers.

(2) Paragraph (1) does not apply to any financial penalty ordered to be paid by the Scottish Ministers or an office in the Scottish Administration which is not a ministerial office.

(3) The Scottish Ministers must pay into the Scottish Consolidated Fund any financial penalty—

- (a) ordered to be paid by them under this Part; and
- (b) recovered by them under paragraph (1).

(4) An office in the Scottish Administration which is not a ministerial office must pay any financial penalty ordered to be paid by them under this Part into the Scottish Consolidated Fund.

(5) In this regulation, “an office in the Scottish Administration which is not a ministerial office” is construed in accordance with section 126(8) of the Scotland Act 1998(a).

## PART 6

### REVOCATIONS, CONSEQUENTIAL AMENDMENTS, SAVINGS AND TRANSITIONAL PROVISIONS

#### Interpretation of Part 6

**109.** In this Part “the 2012 Regulations” means the Utilities Contracts (Scotland) Regulations 2012(b).

#### Revocations and consequential amendments

**110.**—(1) Subject to regulation 111 (transitional provision and saving where procurement commenced before 18th April 2016), the 2012 Regulations are revoked.

(2) The consequential and miscellaneous amendments set out in Schedule 3 (consequential and miscellaneous amendments to subordinate legislation) have effect.

#### Transitional provision and saving: where procurement commenced before 18th April 2016

**111.**—(1) Nothing in these Regulations affects any contract award procedure or design contest commenced before 18th April 2016 which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(2) For that purpose, a contract award procedure or design contest has commenced if, before that date—

- (a) a contract notice, or as the case may be, design contest, has been sent to the Official Journal in accordance with the 2012 Regulations in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement or dynamic purchasing system;
- (b) a periodic indicative notice has been sent to the Official Journal in accordance with the 2012 Regulations, in which case the contract award procedure which is not affected by these Regulations and which will continue to be subject to the application of the 2012 Regulations is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 16(3)(a) or (b) of the 2012 Regulations are satisfied;
- (c) the utility has had published any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system; or
- (d) the utility has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract, framework agreement or dynamic purchasing system.

(3) Nothing in these Regulations affects the award of a specific contract based on a framework agreement where the framework agreement was concluded—

- (a) before 18th April 2016; or

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(a) 1998 c.46.

(b) S.S.I. 2012/89.

- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations,

which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(4) Nothing in these Regulations affects the award of a specific contract under a dynamic purchasing system where the system was established—

- (a) before 18th April 2016; or
- (b) on or after that date following a contract award procedure which, by virtue of paragraph (1), was not affected by these Regulations,

which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(5) Nothing in these Regulations, except regulations 86 (modification of contracts during their term) and 87(1)(a), (2) and (3) (termination of contracts), affects a contract awarded—

- (a) before 18th April 2016; or
- (b) on or after that date, where the award itself was not, by virtue of paragraphs (1) to (4), affected by these Regulations,

which continues to be subject to the application of the 2012 Regulations as if those Regulations had not been revoked.

(6) In this regulation, “contract”, “contract notice”, “design contest”, “dynamic purchasing system”, “economic operator”, “framework agreement”, “periodic indicative notice” and “utility” have the same meanings as in the 2012 Regulations.

#### **Transitory provision: prior to full commencement of regulation 38(1) to (7)**

**112.**—(1) This regulation applies during the period beginning on 18th April 2016 and ending immediately before 18th October 2018.

(2) During that period, a utility may choose between the following means of communication for the purposes mentioned in paragraph (3)—

- (a) electronic means in accordance with regulation 38 (rules applicable to communication);
- (b) post or other suitable carrier;
- (c) fax; or
- (d) a combination of those means.

(3) That choice is available for all communication and information exchange in respect of which both the following criteria are met—

- (a) the use of electronic means would, in accordance with regulation 38(1) to (7) (rules applicable to communication), have been required if those provisions had been in force;
- (b) the use of electronic means is not required by any provision of these Regulations other than regulation 38(1) (rules applicable to communication).

#### **Transitory provision: temporary exemption**

**113.**—(1) Notwithstanding paragraphs (3) and (4) of regulation 1, nothing in the provisions commenced by those paragraphs affect—

- (a) any procurement or design contest that has commenced before the dates respectively mentioned in those paragraphs; or
- (b) any contract awarded as a result of such procurement or following such contest.

(2) For that purpose, a procurement or design contest has commenced before the dates mentioned if, before such date—

- (a) a contract notice or, as the case may be, contest notice, has been sent to the Official Journal in accordance with regulation 69 (form and manner of sending notices for

publication at EU level) in order to invite offers or requests to be selected to tender for or to negotiate in respect of a proposed contract, framework agreement or dynamic purchasing system;

- (b) where a periodic indicative notice has been sent to the Official Journal, in which case the contract award procedure that has commenced is the procedure for the award of any proposed contract the intention to award which was indicated in the notice, but only if the requirements in regulation 65(3)(a) to (c) (periodic indicative notices) are satisfied;
- (c) the utility has dispatched any form of advertisement seeking offers or expressions of interest in a proposed contract, framework agreement or dynamic purchasing system; or
- (d) the utility has contacted any economic operator in order to—
  - (i) seek expressions of interest or offers in respect of a proposed contract, framework agreement or dynamic purchasing system; or
  - (ii) respond to an unsolicited expression of interest or offer received from that economic operator in relation to a proposed contract, framework agreement or dynamic purchasing system.

*KEITH BROWN*

A member of the Scottish Government

St Andrew's House,  
Edinburgh  
26th January 2016

## SCHEDULE 1

Regulation 2(1)

### ACTIVITIES CONSTITUTING WORKS

In this Schedule, 'NACE Rev.1' has the same meaning as in Council Regulation (EEC) No 3037/90 on the statistical classification of economic activities in the European Community<sup>(a)</sup> and numerical references in the columns relating to the NACE Rev.1 relate to the Annex to that Regulation. In the event of any difference of interpretation between the CPV and the NACE Rev.1, the CPV nomenclature shall apply.

| NACE Rev. 1 |       |       |  |   | CPV Code |
|-------------|-------|-------|--|---|----------|
| SECTION F   |       |       | CONSTRUCTION                                       |   |          |
| Division    | Group | Class | Subject  | Notes   |          |
| 45          |       |       | Construction                                       | This division includes:<br>—construction of new buildings and works, restoring and common repairs.  | 45000000 |
|             | 45.1  |       | Site preparation                                   |   | 45100000 |
|             |       | 45.11 | Demolition and wrecking of buildings; earth moving | This class includes:<br>—demolition of buildings and other structures,<br>—clearing of building sites,<br>—earth moving: excavation, landfill, levelling and grading of construction sites, trench digging, rock removal, blasting, etc.<br>—site preparation for mining:<br>—overburden removal and other development and preparation of mineral properties and sites.<br>This class also includes:<br>—building site drainage.<br>—drainage of agricultural or forestry land. | 45110000 |
|             |       | 45.12 | Test drilling and boring                           | This class includes:<br>—test drilling, test boring and core sampling for construction, geophysical, geological or similar purposes.  | 45120000 |

(a) OJ L 293, 24.10.1990, p.1; last amended by Regulation (EC) No 1893/2006 of the European Parliament and of the Council (OJ L 393, 30.12.2006, p.1).

|  |      |       |  |  |   |
|--|------|-------|--|--|---|
|  |      |       |  | <p>This class excludes:</p> <ul style="list-style-type: none"> <li>—drilling of production oil or gas wells, see 11.20.</li> <li>—water well drilling, see 45.25,</li> <li>—shaft sinking, see 45.25,</li> <li>—oil and gas field exploration, geophysical, geological and seismic surveying, see 74.20.</li> </ul>  |   |
|  | 45.2 |       | Building of complete constructions or parts thereof; civil engineering |  | 45200000  |
|  |      | 45.21 | General construction of buildings and civil engineering works          | <p>This class includes:</p> <ul style="list-style-type: none"> <li>—construction of all types of buildings construction of civil engineering constructions,</li> <li>—bridges, including those for elevated highways, viaducts, tunnels and subways,</li> <li>—long-distance pipelines, communication and power lines,</li> <li>—urban pipelines, urban communication and power lines,</li> <li>—ancillary urban works,</li> <li>—assembly and erection of prefabricated constructions on the site.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>—service activities incidental to oil and gas extraction, see 11.20,</li> <li>—erection of complete prefabricated constructions from self-manufactured parts not of concrete, see divisions 20, 26 and 28,</li> <li>—construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations, see 45.23,</li> <li>—building installation, see 45.3,</li> </ul> | <p>45210000</p> <p>Except:</p> <p>—45213316</p> <p>45220000</p> <p>45231000</p> <p>45232000</p> |

|  |  |       |   |  |   |
|--|--|-------|---|--|---|
|  |  |       |   | —building completion, see 45.4,<br>—architectural and engineering activities, see 74.20,<br>—project management for construction, see 74.20.   |   |
|  |  | 45.22 | Erection of roof covering and frames                            | This class includes:<br>—erection of roofs,<br>—roof covering,<br>—waterproofing.  | 45261000  |
|  |  | 45.23 | Construction of highways, roads, airfields and sport facilities | This class includes:<br>—construction of highways, streets, roads, other vehicular and pedestrian ways,<br>—construction of railways,<br>—construction of airfield runways,<br>—construction work, other than buildings, for stadiums, swimming pools, gymnasiums, tennis courts, golf courses and other sports installations,<br>—painting of markings on road surfaces and car parks.<br><br>This class excludes:<br>—preliminary earth moving, see 45.11. | 45212212 and DA03<br>45230000<br><br>Except:<br>—45231000<br>—45232000<br>—45234115 |
|  |  | 45.24 | Construction of water projects                                  | This class includes:<br>—construction of:<br>—waterways, harbour and river works, pleasure ports (marinas), locks etc.;<br>—dams and dykes,<br>—dredging,<br>—subsurface work.   | 45240000  |
|  |  | 45.25 | Other construction work involving special trades                | This class includes:<br>—construction activities specialising in one aspect common to different kinds of structures, requiring specialised skill or equipment,   | 45250000  |

|  |      |       |  |  |  |
|--|------|-------|--|--|--|
|  |      |       |  | <p>—construction of foundations, including pile driving,<br/> —water well drilling and construction, shaft sinking,<br/> —erection of non-self-manufactured steel elements,<br/> —steel bending,<br/> —bricklaying and stone setting,<br/> —scaffolds and work platform erecting and dismantling, including renting of scaffolds and work platforms,<br/> —erection of chimneys and industrial ovens.</p> <p>This class excludes:<br/> —renting of scaffolds without erection and dismantling, see 71.32</p> | 45262000                                     |
|  | 45.3 |       | Building installation                          |  | 45300000                                     |
|  |      | 45.31 | Installation of electrical wiring and fittings | <p>This class includes: installation in buildings or other construction projects of:<br/> —electrical wiring and fittings,<br/> —telecommunications systems,<br/> —electrical heating systems,<br/> —residential antennas and aerials,<br/> —fire alarms,<br/> —burglar alarm systems,<br/> —lifts and escalators,<br/> —lightning conductors, etc.</p>  | 45213316<br>45310000<br>Except:<br>—45316000 |
|  |      | 45.32 | Insulation work activities                     | <p>This class includes:<br/> —installation in buildings or other construction projects of thermal, sound or vibration insulation.<br/> This class excludes:<br/> —waterproofing, see 45.22.</p>  | 45320000                                     |

|  |      |       |                             |  |                                  |
|--|------|-------|-----------------------------|--|----------------------------------|
|  |      | 45.33 | Plumbing                    | <p>This class includes:</p> <ul style="list-style-type: none"> <li>—installation in buildings or other construction projects of:</li> <li>—plumbing and sanitary equipment,</li> <li>—gas fittings,</li> <li>—heating, ventilation, refrigeration or air-conditioning equipment and ducts,</li> <li>—sprinkler systems.</li> </ul> <p>This class excludes:</p> <ul style="list-style-type: none"> <li>—installation of electrical heating systems, see 45.31.</li> </ul> | 45330000                         |
|  |      | 45.34 | Other building installation | <p>This class includes:</p> <ul style="list-style-type: none"> <li>—installation of illumination and signalling systems for roads, railways, airports and harbours,</li> <li>—installation in buildings or other construction projects of fittings and fixtures N.E.C.</li> </ul>  | 45234115<br>45316000<br>45340000 |
|  | 45.4 |       | Building completion         |  | 45400000                         |
|  |      | 45.41 | Plastering                  | <p>This class includes:</p> <ul style="list-style-type: none"> <li>—application in buildings or other construction projects of interior and exterior plaster or stucco, including related lathing materials.</li> </ul>  | 45410000                         |
|  |      | 45.42 | Joinery installation        | <p>This class includes:</p> <ul style="list-style-type: none"> <li>—installation of not self-manufactured doors, windows, door and window frames, fitted kitchens, staircases, shop fittings and the like, of wood or other materials,</li> <li>—interior completion such as ceilings, wooden wall coverings, movable partitions, etc.</li> </ul>  | 45420000                         |

|  |      |       |   |   |                               |
|--|------|-------|---|---|-------------------------------|
|  |      |       |   | This class excludes:<br>—laying of parquet and other wood floor coverings, see 45.43  |                               |
|  |      | 45.43 | Floor and wall covering                                       | This class includes:<br>—laying, tiling, hanging or fitting in buildings or other construction projects of:<br>—ceramic, concrete or cut stone wall or floor tiles,<br>—parquet and other wood floor coverings carpets and linoleum floor coverings,<br>—including of rubber or plastic,<br>—terrazzo, marble, granite or slate floor or wall coverings,<br>—wallpaper. | 45430000                      |
|  |      | 45.44 | Painting and glazing  | This class includes:<br>—interior and exterior painting of buildings,<br>—painting of civil engineering structures,<br>—installation of glass, mirrors, etc.<br>This class excludes:<br>—installation of windows, see 45.42.  | 45440000                      |
|  |      | 45.45 | Other building completion                                     | This class includes:<br>—installation of private swimming pools,<br>—steam cleaning, sand blasting and similar activities for building exteriors,<br>—other building completion and finishing work n.e.c.<br>This class excludes:<br>—interior cleaning of buildings and other structures see 74.70.  | 45212212 and DA04<br>45450000 |
|  | 45.5 |       | Renting of construction or demolition equipment with operator |   | 45500000                      |
|  |      | 45.50 | Renting of construction or                                    | This class excludes:<br>—renting of construction  | 45500000                      |

|  |  |  |  |   |  |
|--|--|--|--|---|--|
|  |  |  | demolition<br>equipment with<br>operator | or demolition machinery<br>and equipment without<br>operators, see 71.32. |  |
|--|--|--|--|---|--|

## SCHEDULE 2

Regulations 15(1)(c),  
65(9), 88 and 90(11)

### SOCIAL AND OTHER SPECIFIC SERVICES

| <i>CPV Code</i>  | <i>Description</i>   |
|--|--|
| 75200000-8; 75231200-6; 75231240-8;<br>79611000-0; 79622000-0 (Supply services of domestic help personnel); 79624000-4 (Supply services of nursing personnel) and 79625000-1 (Supply services of medical personnel) from 85000000-9 to 85323000-9; 98133100-5, 98133000-4; 98200000-5; 98500000-8 (Private households with employed persons) and 98513000-2 to 98514000-9 (Manpower services for households, Agency staff services for households, Clerical staff services for households, Temporary staff for households, Home-help services and Domestic services)   | Health, social and related services  |
| 85321000-5 and 85322000-2, 75000000-6 (Administration, defence and social security services), 75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80000000-4 Education and training services to 80660000-8; from 92000000-1 to 92700000-8; 79950000-8 (Exhibition, fair and congress organisation services), 79951000-5 (Seminar organisation services), 79952000-2 (Event services), 79952100-3 (Cultural event organisation services), 79953000-9 (Festival organisation services), 79954000-6 (Party organisation services), 79955000-3 (Fashion shows organisation services), 79956000-0 (Fair and exhibition organisation services) | Administrative social, educational, healthcare and cultural services   |
| 75300000-9   | Compulsory social security services  |
| 75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1   | Benefit services   |
| 98000000-3; 98120000-0; 98132000-7; 98133110-8 and 98130000-3  | Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services |
| 98131000-0   | Religious services   |
| 55100000-1 to 55410000-7; 55521000-8 to 55521200-0 (55521000-8 Catering services for private households, 55521100-9 Meals-on-wheels services, 55521200-0 Meal delivery service) 55520000-1 Catering services, 55522000-5 Catering services for transport enterprises, 55523000-2 Catering services for other enterprises or other  | Hotel and restaurant services  |

|  |  |
|--|--|
| institutions, 55524000-9 School catering services 55510000-8 Canteen services, 55511000-5 Canteen and other restricted-clientele cafeteria services, 55512000-2 Canteen management services, 55523100-3 School-meal services   |  |
| 79100000-5 to 79140000-7; 75231100-5;  | Legal services, to the extent not excluded by regulation 20(1)(d)  |
| 75100000-7 to 75120000-3; 75123000-4; 75125000-8 to 75131000-3   | Other administrative services and government services  |
| 75200000-8 to 75231000-4   | Provision of services to the community   |
| 75231210-9 to 75231230-5; 75240000-0 To 75252000-7; 794300000-7; 98113100-9  | Prison related services, public security and rescue services to the extent not excluded by regulation 20(1)(i) |
| 79700000-1 to 79721000-4 (Investigation and security services, Security services, Alarm- monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services) 79722000-1(Graphology services), 79723000-8 (Waste analysis services)  | Investigation and security services  |
| 98900000-2 (Services provided by extra-territorial organisations and bodies) and 98910000-5 (Services specific to international organisations and bodies)  | International services   |
| 64000000-6 (Postal and telecommunications services), 64100000-7 (Post and courier services), 64110000-0 (Postal services), 64111000-7 (Postal services related to newspapers and periodicals), 64112000-4 (Postal services related to letters), 64113000-1 (Postal services related to parcels), 64114000-8 (Post office counter services), 64115000-5 (Mailbox rental), 64116000-2 (Post-restante services), 64122000-7 (Internal office mail and messenger services) | Postal services  |
| 50116510-9 (Tyre-remoulding services), 71550000-8 (Blacksmith services)  | Miscellaneous services   |

## CONSEQUENTIAL AND MISCELLANEOUS AMENDMENTS TO SUBORDINATE LEGISLATION

### **Cleaner Road Transport Vehicles (Scotland) Regulations 2010**

**1.**—(1) The Cleaner Road Transport Vehicles (Scotland) Regulations 2010(a) are amended as follows.

(2) In regulation 2(b) (interpretation) in the definition of—

“contracting entity” for “regulation 3 of the Utilities Contracts (Scotland) Regulations 2012” substitute “regulation 4 of the Utilities Contracts (Scotland) Regulations 2016”; and

“operator” for “regulation 11 of the Utilities Contracts (Scotland) Regulations 2012” substitute “regulation 15 of the Utilities Contracts (Scotland) Regulations 2016”.

(3) In regulation 6(1)(b)(c) (enforcement of duties) for “Part 9 of the Utilities Contracts (Scotland) Regulations 2012” substitute “Chapter 2 of Part 5 of the Utilities Contracts (Scotland) Regulations 2016”.

### **Defence and Security Public Contracts Regulations 2011**

**2.**—(1) The Defence and Security Regulations are amended as follows.

(2) In regulation 4(d)(d) (contracting authorities) for “regulation 3 of the Utilities Contracts (Scotland) Regulations 2012” substitute “regulation 4 of the Utilities Contracts (Scotland) Regulations 2016”.

(3) In regulation 6(e) (application) for “the Utilities Contracts (Scotland) Regulations 2012”, in each place it occurs, substitute “the Utilities Contracts (Scotland) Regulations 2016”.

### **Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013**

**3.**—(1) The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013(f) is amended as follows.

(2) In paragraph 10 (public procurement) of Schedule 3 (exclusions of section 4(2)(a) and (b) of the Act)—

(a) in sub-paragraph (1)(a) for “regulation 26 of the Utilities Contracts (Scotland) Regulations 2012” substitute “regulation 78 of the Utilities Contracts (Scotland) Regulations 2016”;

(b) in sub-paragraph (1)(b) for “regulation 34 of the Utilities Contracts (Scotland) Regulations 2012” substitute “Chapter 2 of Part 3 of the Utilities Contracts (Scotland) Regulations 2016”;

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(a) S.S.I. 2010/390.

(b) Regulation 2 amended by S.S.I. 2012/88, schedule 7(B), paragraph 1 and S.S.I. 2012/89, schedule 5(B), paragraph 1.

(c) Regulation 6(1)(b) amended by S.S.I. 2012/89, schedule 5(B), paragraph 1.

(d) Regulation 4(d) amended by S.S.I. 2012/89, schedule 5(B), paragraph 1.

(e) Regulation 6 amended by S.S.I. 2012/88, schedule 7(B), paragraph 1; S.S.I. 2012/89, schedule 5(B), paragraph 1; and S.I. 2015/102, schedule 6(2), paragraph 19(5).

(f) S.S.I. 2013/50.

- (c) for sub-paragraph (2) substitute—
- “(2) For the purposes of contract award procedures or design contests commenced before 18th April 2016 and on or after 1st May 2012, the references in sub-paragraph (1)—
- (a) to regulations 58 and 79 of the Public Contracts (Scotland) Regulations 2015 are to be read as references to regulations 23 and 33 of the Public Contracts (Scotland) Regulations 2012**(a)**; and
  - (b) to regulation 78 and Chapter 2 of Part 3 of the Utilities Contracts (Scotland) Regulations 2016 are to be read as references to regulations 26 and 34 of the Utilities Contracts (Scotland) Regulations 2012**(b)**”; and
- (d) at the end of sub-paragraph (3) insert—
- “(d) regulation 111(2) of the Utilities Contracts (Scotland) Regulations 2016.”.

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(a) S.S.I. 2012/88, repealed by regulation 97 of the Public Contracts (Scotland) Regulations 2015, S.S.I. 2015/446, subject to the savings and transitional provisions in regulation 98 of those Regulations.

(b) S.S.I. 2012/89, repealed by regulation 110 of these Regulations subject to the savings and transitional provisions in regulation 111 of these Regulations.

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations revoke and replace the Utilities Contracts (Scotland) Regulations 2012 (“the 2012 Regulations”).

Parts 1 to 4 implement, for Scotland, Directive 2014/25/EU of the European Parliament and of the Council of 26th February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p.243). These Parts impose obligations on utilities in relation to how they award contracts for the execution of works, the supply of products or the provision of services. In particular—

- Part 1 sets out the scope of the Regulations (including by reference to activities and to thresholds based on the estimated value of the procurement) and lays down some general rules and principles that apply to a procurement within the scope of the Regulations;
- Part 2 sets out detailed rules to be followed in relation to a procurement (except where Part 3 applies);
- Part 3 establishes particular procurement regimes for the procurement of social and other specific services and the use of design contests: these regimes impose less detailed requirements and allow greater flexibilities than under Part 2; and
- Part 4 imposes certain requirements on utilities in relation to recording and reporting information, including requirements about retaining copies of contracts above a certain value, documenting the progress of a procurement and sending information about a procurement to the Scottish Ministers and European Commission on request.

Part 5 contains provisions about remedies (and their facilitation) in relation to a procurement within the scope of Parts 1 to 4. These provisions replace Part 9 of the 2012 Regulations. In so doing, they implement, for Scotland, Council Directive 92/13/EEC of 25<sup>th</sup> February 1992 on coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p.14) as amended<sup>(a)</sup>.

Part 6 contains provisions which—

- revoke the 2012 Regulations and make consequential and miscellaneous amendments to secondary legislation; and
- make transitional, transitory and savings provisions, including provisions for certain procurements commenced before the commencement of these Regulations which are not to be affected by these Regulations.

A full regulatory assessment of the effect that these Regulations will have on the costs of business has been prepared and placed in the Scottish Parliament Information Centre. Copies may be obtained from the Scottish Procurement Directorate’s website at [www.scotland.gov.uk/topics/government/spd](http://www.scotland.gov.uk/topics/government/spd).

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(a) By Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Annex I - List referred to in Article 29 of the Act of Accession - XI. Internal Market and Financial Services - E. Procurement (OJ C 241, 29.8.1994); by Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded - Annex II: List referred to in Article 20 of the Act of Accession - 1. Free movement of goods - I. Public procurement (OJ L 236, 23.9.2003); Council Directive 2006/97/EC adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania (OJ L 363, 20.12.2006); Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p.31); and by Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts (OJ L 94, 28.3.2014, p.1).

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